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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 818

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

Petitioners,

vs.

CITY OF NEWARK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS AND BRIEF IN SUPPORT THEREOF.

HOLMES, ROGERS & CARPENTER,
By: OLIVER C. CARPENTER,
A member of the firm,
Attorneys for Petitioners,
No. 42 Broadway,
New York, N. Y.

WM. E. CLARK,
CHARLES P. ROGERS,
of New York, N. Y.,
RAYMOND H. COHN,
of Newark, N. J.,
JAMES D. CONNELL,
of Hoboken, N. J. and
VICTOR RUSKIN,
of Jersey City, N. J.,
Of Counsel.

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No.

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Petitioners,

vs.

CITY OF NEWARK,

Respondent.

Petition for Writ of Certiorari.

The petitioners respectfully show:

1.

Chronology.

This matter had its inception in a petition by the relators below for an alternative or peremptory writ of mandamus requiring the respondent below, City of Newark, to apply to a Justice of the Supreme Court of the State of New Jersey at the Circuit of said Court in and for the County of Essex for the appointment of three commissioners to ascertain the damages suffered by the relators below by reason of the taking of their land, by the City of Newark (R. 23).

The petition was supported by the affidavit of George C. Shipman, sworn to on March 14th, 1934 (R. 36), and by the affidavit of Nathan Kussy, Esq., sworn to on May 29th, 1934 (R. 46). Said petition and supporting affidavits were filed on June 12th, 1934.

On the 9th day of June, 1934, Mr. Justice Parker, one of the Justices of the New Jersey Supreme Court, made and granted a rule requiring the respondent below to show cause why an alternative or peremptory writ of mandamus should not issue as prayed for in the petition herein (R. 51), which rule was filed on June 12th, 1934.

Subsequently George C. Shipman, one of the relators, died, and the co-relators, Anna S. A. Graf and August Graf, individually, and said August Graf, as Executor of the Will of George C. Shipman, deceased, were substituted as parties relators in the place and stead of George C. Shipman, deceased, by an order duly made on November 16th, 1937 (R. 52), and the said order was thereafter duly filed.

By stipulation filed April 28th, 1939, counsel for the parties hereto agreed to submit the matter to the Court upon an agreed statement of facts, and briefs (R. 53).

The matter was submitted to the Court upon an agreed statement of facts, and briefs, at the October, 1939, Term thereof (R. 54).

On March 16th, 1940, the Court rendered its opinion, finding adversely to the relators below (R. 7), and directed that the rule to show cause be discharged.

On April 13th, 1940, a rule was made discharging said rule to show cause, and the same was filed on April 25th, 1940 from which no appeal would lie.

On December 12th, 1941, the relators below made application to Mr. Chief Justice Brogan, and Associate Justices Donges and Porter, at Trenton, the same Justices by whom the matter had been considered at the October,

1939, Term, for leave to mold pleadings so as to permit an appeal. This motion was granted, and on January 13th, 1942, an order was made permitting the molding of pleadings so as to contain an alternative writ of mandamus, a return thereto by the respondent, a demurrer to said return by the relators, a joinder in demurrer by the respondent, and a rule overruling the demurrer and directing the entry of final judgment from which an appeal might be taken (R. 13), and upon said rule overruling the demurrer a final judgment was entered herein in favor of the respondent below and against the relators below (R. 11), from which and from each and every part thereof, the relators below took an appeal to the New Jersey Court of Errors and Appeals (R. 3), which Court is composed of 16 judges; viz: the Chancellor, the nine Justices of the New Jersey Supreme Court and six Lay Judges, except that the three Supreme Court Justices who heard and decided the cause in the Court below do not hear or decide the matter of the appeal thus leaving the hearing and decision of such appeal to a bench of thirteen judges who, in the instant case were the Chancellor, six Supreme Court Justices and six Lay Judges.

On September 18th, 1942 the said Court of Errors and Appeals affirmed the judgment of the Court below by a per curiam opinion concurred in by seven and dissented to by three judges, three judges not voting (R. 3).

Of the seven judges voting for affirmance, one was the Chancellor, two were Supreme Court Justices and four were Lay Judges, and of the three judges dissenting, two were Supreme Court Justices and one was a Lay Judge.

On October 15th, 1942, a rule for judgment of affirmance and remittitur was duly entered (R. 2).

The judgment of the said Court of Errors and Appeals affirming the judgment of the New Jersey Supreme Court,

by precedent, creates a law of the State of New Jersey which is repugnant to and violative of the Constitution of these United States of America in that said law, so created:

(a) Allows the taking of private property for a public use without just compensation.

(b) Deprives these petitioners of their property without due process of law.

(c) Impairs the obligation of an existing contract thereby divesting the petitioners of their property and property rights and their vested interest therein.

Statement of the Matter Involved.

A company known as the Morris Canal and Banking Company was incorporated in the year 1824 under an act entitled: "An act to incorporate a company to form an artificial navigation between the Passaic and Delaware rivers" (Laws of 1824, p. 158) (App. 65), by which the company was authorized to construct a canal to connect the waters of the Delaware River near Easton with the tide waters of the Passaic River (R. 56).

Said Act conferred upon the company so created the power of eminent domain, as well also as the right to take by purchase or gift any and all lands necessary and proper to be taken and occupied for the uses and purposes of the canal, and said company was limited in the acquisition and holding of land to such lands only as were necessary and proper for canal purposes (R. 57).

The petitioners are heirs at law and survivors in interest of Charles T. Shipman, who in the year 1830, at the date of the conveyance to the Morris Canal and Banking Company hereinafter referred to, was the owner of a one-half interest in the premises hereinafter described; the

other tenants in common of said property being Abraham W. Kinney, owner of a one-eighth interest, John C. Hedenberg, owner of a one-eighth interest, and Andrew Rankin, owner of a one-fourth interest therein (R. 54).

At the time of its incorporation the Morris Canal and Banking Company owned no property, but by said act was simply to acquire in one of the manners aforesaid such land only as was necessary for the construction and operation of said canal.

By an instrument in writing, under their hands and seals, dated January 9th, 1830, the said Charles T. Shipman, Abraham W. Kinney, John C. Hedenberg, and Andrew Rankin, conveyed to the Morris Canal and Banking Company, in consideration of Three ($3.00) Dollars and other considerations, the premises described in the deed which is set out at length in the agreed statement of facts (R. 55), and the said conveyance in its habendum clause contained the conditional limitation "so long as" the same shall be used for the purposes for which the Morris Canal and Banking Company has power to use the same by the true intent and meaning of the said Act (R. 56).

By deed dated and acknowledged May 29th, 1830, and recorded December 1st, 1830, the said John C. Hedenberg, and Telezeale, his wife, conveyed to Charles T. Shipman, in consideration of Three hundred ($300) Dollars their undivided one-eighth interest in said premises, and by deed dated November , 1830, Luther Goble and Phoebe Goble, his wife, conveyed to said Charles T. Shipman, in consideration of Six hundred ($600) Dollars, their undivided one-fourth interest in said premises, whereby the said Charles T. Shipman acquired title to and became the owner of the equal undivided seven-eighths part and interest in said premises (R. 56).

Section 25 of said Act provided "that the said canal,

when completed, shall forever thereafter be esteemed a public highway, free for the transportation of any goods, commodities, or other produce whatsoever, on payment of the tolls, and conforming to the regulations made or authorized by this Act" (App. 80, R. 57).

Section 26 of the said Act provided that at the end of ninety-nine years from the passage of the Act it should be lawful for the State to take to itself, and on its own account, the canal and its appurtenances, upon paying to the company the fair value thereof to be estimated and fixed by a Commission chosen by the State and the Company, "or in case that shall not be done at that time or within one year thereafter, this charter shall continue so far as respects its canal operations and privileges for the further term of fifty years, when it shall cease and the said canal with its appurtenances become the sole property of the State" (R. 57). (App. 81).

Section 27 of said Act specifically provided that "it shall be so construed that the said corporation shall not be authorized to take or appropriate to the use of said canal or under color or pretense that the same are necessary therefor, any lands, waters or streams of water, but such only as are actually necessary for the erection and use of said canal for the purpose of navigation only and its necessary towing paths and works as specified by the fifth section of this Act (which authorizes the company to construct the canal, together with locks, toll houses, etc.), and that the said corporation shall not be authorized to demise, grant, alien, or sell any such lands, waters or streams, taken or pretended to be taken or acquired for the use of said canal as aforesaid, or any part thereof, to any person or persons whomsoever (excepting only such lands as may be received by them by donation or acquired by them under private contract) and that the said corporation or any other person shall not be authorized to use or appro-

priate any part of said waters for mills or any other purpose than the mere navigation of said canal" (App. 81 R. 57).

In the year 1922 an Act was passed by the Legislature of the State of New Jersey (Laws of 1922, p. 367) entitled: "An Act to authorize the acquisition by the State of the Morris Canal (as defined in this Act) in whole or in part and all of the stock of the Morris Canal and Banking Company and the rights of all stockholders in said Company and in said canal property and water rights, and all or any part of the right, title and interest of the Lehigh Valley Railroad Company in said canal property and water rights by virtue of its lease of the said canal from the Morris Canal and Banking Company or otherwise; to provide for a commission authorized to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company in relation to the said canal property and water rights; and to vest in said commission certain powers necessary for the carrying out of the terms of settlement and to make such other provisions as may be necessary to effectuate the objects aforesaid" (App. 82, R. 57).

Pursuant to said last mentioned Act a commission was appointed and did conduct negotiations with the Morris Canal and Banking Company, and its lessee, Lehigh Valley Railroad Company, and as a result of such negotiations the said Morris Canal and Banking Company and the Lehigh Valley Railroad Company in 1923 conveyed to the State of New Jersey lands and rights of way embracing the canal property running through the State of New Jersey, including the premises in question (App. 88, R. 58). Subsequently, by Act of the Legislature (Laws 1923, p. 34) it was provided that the title to the property acquired or to be acquired by the State of New Jersey shall be vested in the Morris Canal and Banking Com-

pany, in trust for the State of New Jersey (App. 101, R. 58).

By an Act passed the following year (Laws 1924, Ch. 78, p. 151) it was provided that, upon the abandonment by lawful authority of navigation upon the Morris Canal, the City within which any canal property is located might acquire for public use such parts of the canal property as might be located within its boundaries (App. 103, R. 58).

Said act further provides in Section 3 thereof: "Any municipality, county or counties which shall purchase any of such property may acquire by gift, purchase or condemnation any reversionary and any other private rights in the property so purchased" (App. 104).

In the same year (Laws 1924, Ch. 229, p. 506), the Morris Canal and Banking Company was authorized and directed (by Section I of said Act) to discontinue the use as a means of transportation by water of that portion of the property which had theretofore been used for such purpose (including the premises in question), and authorized the company to drain off the water from the canal and feeders. It further provided that "such portions of such property shall be applied and are hereby dedicated to the public use as public highways for the transportation and passage thereon of persons and property and for any and all further purposes of such highways." It further authorized said company (Section 4 of said Act) to sell to the municipalities through which the canal passed the portions of the canal situated within their respective boundaries, and provided further that, upon the purchase of any such property by any municipality for public use, the property so purchased shall be applied to such public use or uses, or some of them, and such public use or uses shall supersede any other or different public use to which such property may have been there-

tofore dedicated (Laws of 1924, p. 508) (App. 106, R. 59).

By deed dated June 4th, 1927, and recorded in Book Y-76 of Deeds for Essex County, pages 381, *et seq.*, the Morris Canal and Banking Company acting in the name of and as trustee for the State of New Jersey, conveyed to the City of Newark all of the right, title and interest of the Morris Canal and Banking Company and the State of New Jersey in and to the canal property within its borders, including the premises in question (R. 59), and thereafter the City of Newark entered upon said lands and asserted title thereto, and entered into a contract with Public Service Coordinated Transport, a corporation of the State of New Jersey, operating an extensive system of electric street railways, whereby the said City of Newark agreed to construct a double track electric railway along a portion of the canal property, including the premises in question, upon which the railway company was granted the right to enter and enjoy the exclusive right to operate the same (R. 59).

Upon the abandonment of the canal, the lands conveyed by Shipman and others to the Morris Canal and Banking Company, by the terms of the deed of conveyance, reverted to the petitioners, and they are now the true and lawful owners of such lands and entitled to the possession thereof. The respondent, City of Newark, in total disregard of the rights of the petitioners, has taken and now holds the possession, use and occupancy of said lands to the exclusion of the rights of the petitioners, and to their damage, and it is the lawful duty of the respondent, City of Newark, to ascertain in a legal manner the extent of the damages sustained by the petitioners by reason of such unlawful taking and withholding of said land and to pay such damages. The respondent, City of Newark, now holds and occupies said lands adversely to the rights

of the petitioners, because by the terms of the deed and the charter of the Morris Canal and Banking Company the land could be used for canal purposes only, and the same reverted to the petitioners upon the abandonment of the canal. From the date of the deed of conveyance made by Shipman and others to the Morris Canal and Banking Company (R. 25-55), the said Shipman and others had a vested right in said property, which by and under the laws of the State of New Jersey descended to and became vested in the petitioners, and of which they cannot lawfully be deprived.

The land in question was never dedicated as a highway, because to dedicate presupposes ownership, and at the time of the alleged dedication by the terms of the charter of the Morris Canal and Banking Company (App. 80), neither the State nor the Morris Canal and Banking Company had any title to the said lands, and any seeming attempt by the Legislature of the State of New Jersey in its enactment of 1824, Section 25 thereof (App. 80), to dedicate the canal as a public highway was no dedication whatsoever for the reason that the Legislature plainly said "shall forever thereafter be esteemed a public highway," thereby meaning to deprive the Morris Canal and Banking Company of the right to discriminate between persons desiring to use its facilities; and finally, no valid legislation can be made whereby the petitioners may be deprived of a vested right; and, therefore, any attempt by the Legislature to do so by the enactment of the statutes of 1922, 1923, and 1924 (App. 82, 101, 103), invades the rights secured to the petitioners by the Constitution of the State of New Jersey and by the Constitution of these United States of America.

III.

Reasons Relied On for the Allowance of the Writ.

The reasons why this writ should be granted are:

1. The New Jersey Court of Errors and Appeals, the Court of last resort of the State of New Jersey, by affirming the judgment of the New Jersey Supreme Court, has decided an important question of law affecting the property and vested property rights of these petitioners and a large number of other citizens of the State of New Jersey and of the United States of America, thereby creating and establishing a law contrary to the rule of the common law and repugnant to and violative of applicable provisions of the constitution and statutes of the State of New Jersey, the constitution of these United States of America and the decisions of this Honorable Court, to wit:

(a) That the canal property, including the premises in question, was duly conveyed to the State in 1923 by the Canal Company and its lessee, The Lehigh Valley Railroad Company (R. 9).

(b) That the respondent, City of Newark, did acquire the land mentioned and described in the record herein at pages 25-55 pursuant to the provisions of law.

(c) That the Charter of the Canal Company (App. 65) did not limit it to use the land acquired by it, including the land in question for the purposes of navigation only.

(d) That the conveyance made by Shipman *et als.*, to the Canal Company did not convey an estate upon conditional limitation which terminated upon the abandonment of the canal (R. 10).

(e) That there was no merit in the claim of petitioners that the conveyance made by Shipman *et als.*, to the Canal Company conveyed only an estate upon conditional limitation which terminated upon the abandonment of the canal (R. 10).

(f) That other acts of the New Jersey Legislature, to wit: those acts relating to the abandonment of the canal and the disposition of the canal property, are in effect amendments to the Charter of the Canal Company, are *in pari materia* and should be construed together as a whole (R. 10).

(g) That the abandonment of the canal as such does not raise the presumption that the State relinquished its rights in the property (R. 10).

(h) That there has been no change in the use of the land (R. 10).

(i) That there is no reversion in the land to these petitioners (R. 10).

(j) That the respondent, City of Newark, as successor in title to the Canal Company, acquired a good and valid title to the land in question from the State of New Jersey (R. 10).

2. That the New Jersey Court of Errors and Appeals, by the affirmance of the judgment of the New Jersey Supreme Court in this cause has decided an important question of law effecting the property and vested property rights of these petitioners and others of like situation and in like circumstances, thereby creating and establishing, by precedent, a law which is contrary to the rule of the common law, contrary to existing statutes and precedents of the State of New Jersey, repugnant to and violative to the constitution of the State of New Jersey,

repugnant to and violative of the constitution of these United States of America, and contrary to the decisions of this Honorable Court in that such law, so created and established:

(a) Amounts to the taking of private property for a public use without just compensation contrary to and in violation of Section 16 of Article 1 of the constitution of the State of New Jersey.

(b) Amounts to a deprivation of the natural and unalienable rights of these petitioners of "acquiring, possessing and protecting property", secured to them and to all inhabitants of the State of New Jersey under the provisions of Section 1 of Article 1 of the constitution of said State.

(c) Amounts to the impairment of the obligation of an existing contract, thereby depriving these petitioners of their vested property and property rights contrary to and in violation of the provisions of Article IV, Sec. VII, Paragraph 3 of the constitution of the State of New Jersey.

(d) Deprives these petitioners of their property without due process of law contrary to and in violation of the fifth and fourteenth amendments of the constitution of these United States of America.

(e) Permits the taking of private property for a public use without just compensation, contrary to and in violation of the fifth and fourteenth amendments of the constitution of these United States of America.

(f) Impairs the obligation of an existing contract thereby depriving these petitioners of their vested property and property rights contrary to and in violation of Section 10 of Article 1, of the constitution of these United States of America.

3. The New Jersey Court of Errors and Appeals, by affirming the judgment of the New Jersey Supreme Court, has decided an important question of law affecting the property and vested property rights of a vast number of people, including these petitioners, to wit: all residents and citizens of the United States of America who have reversionary rights and interests in land, located in the State of New Jersey which have reverted or which will hereafter revert to them under existing contracts in the form of deeds conveying property for a public or semi-public use such as highways, streets, railroads, public buildings, churches, schools, parks, canals, libraries and other specific uses, where such deeds provide that the land shall revert upon the abandonment of such specific use, and thereby created and established, by precedent, a law of the State of New Jersey which is contrary to the Rule of the common law, contrary to the Statutes and precedents of the State of New Jersey, repugnant to and violative of the constitution of these United States of America and contrary to the rulings and decisions of this Honorable Court in that said law, so created and established

(a) Amounts to the taking of private property for a public use without just compensation, contrary to and in violation of Section 16 of Article 1 of the constitution of the State of New Jersey.

(b) Amounts to the deprivation of the natural and unalienable right of all persons in like circumstances with and of like situation to these petitioners, of acquiring, possessing and protecting property, secured to them under the provisions of Section 1 of Article 1 of the constitution of the State of New Jersey.

(c) Amounts to the impairment of the obligation of an existing contract, thereby depriving all those persons of like interest to and in like situation with these petitioners,

of their property and vested property rights contrary to and in violation of the provisions of Article IV, Section VII, paragraph 3 of the constitution of the State of New Jersey.

(d) Deprives all of those persons of like interest to and in like situation with these petitioners of their property without due process of law, contrary to and in violation of the Fifth and Fourteenth amendments of the constitution of these United States of America.

(e) Permits the taking of private property for a public use without just compensation, contrary to and in violation of the Fifth and Fourteenth amendments of the constitution of these United States of America.

(f) Impairs the obligation of an existing contract thereby depriving those of like interest to and in like situation with these petitioners of their property and vested property rights, contrary to Section X of Article 1 of the constitution of these United States of America.

WHEREFORE, these petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the New Jersey Court of Errors and Appeals commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause which was entitled in that Court, Anna S. A. Graf and August Graf, individually, and said August Graf, as executor of the Estate of George C. Shipman, Deceased, Ruth Marsh, Doris Marsh, Blanche Bellows, Amy Williams King, T. Wright Williams and Adelaide S. Williams, Relators-Appellants, vs. City of Newark, Respondent-Appellee, and that the judgment of the said New Jersey Court of Errors and Appeals affirming the judg-

ment of the New Jersey Supreme Court and the judgment so affirmed may be reversed by this Honorable Court, and that these petitioners may have such other and further relief in the premises as may be just.

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

Petitioners,

By: OLIVER C. CARPENTER,
A member of the firm of Holmes, Rogers & Carpenter,
Attorneys for Petitioners,
No. 42 Broadway,
New York, N. Y.

WM. E. CLARK,
CHARLES P. ROGERS,
of New York, N. Y.,

RAYMOND H. COHN,
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OCTOBER TERM, 1942.

No.

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF, as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

Petitioners,

vs.

CITY OF NEWARK,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinions of the Courts below have been officially printed.

The opinion of the New Jersey Supreme Court was filed on March 16th, 1940, is reported in 124 N. J. L. at page 312 (11 Atl. 2nd 764), and a copy thereof appears at page 7 of the record. The opinion of the New Jersey Court of Errors and Appeals was filed on September 18th, 1942, is reported in 125 N. J. L., at page 96, and a copy thereof appears at page 3 of the record. The Rule for judgment of affirmance and remittitur was entered

on October 15th, 1942 and a copy thereof apears at page 2 of the record. The judgment of affirmance and remittitur allowed by the last mentioned rule has not yet been filed, entered or served.

Jurisdiction.

The Statute conferring authority to review herein is U. S. Code annoted, Title 28, Section 344 (Judicial Code, Section 237 as amended).

Statement of the Case.

A statement of the case has been given in the petition submitted herewith and is, therefore, not repeated here.

Specification of Errors.

The grounds of appeal from the judgment of the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals appear at pages 3 to 6 of the record. The errors here relied upon are:

1. Because the Court erred in finding that "the canal property, including the premises in question, was duly conveyed to the State in 1923 by the Canal Company and its lessee, The Lehigh Valley Railroad."
2. Because the Court erred in finding that the respondent, City of Newark, did acquire the land in question herein pursuant to the provisions of law.
3. Because the Court erred in finding that the Charter of the Canal Company did not limit it to use the land in question herein for the purpose of navigation only.

4. Because the Court erred in finding that the conveyance made by Shipman *et als.* to the Canal Company did not convey an estate upon conditional limitation, which terminated upon the abandonment of the canal.

5. Because the Court erred in holding that there was no merit in the contention of the petitioners that the conveyance made by Shipman, *et als.* to the Canal Company conveyed only an estate upon conditional limitation, which terminated upon the abandonment of the canal.

6. Because the Court erred in holding other acts of the Legislature, to wit: those relating to the abandonment of the canal and the disposition of the canal property, are in effect amendments to the Charter of the Canal Company and are in *pari materia* and should be construed together as a whole.

7. Because the Court erred in holding that the abandonment of the canal as such does not raise the presumption that the State relinquished its rights in the property.

8. Because the Court erred in holding that there has been no change in the use of the land.

9. Because the Court erred in holding that there is no reversion of the land to these petitioners.

10. Because the Court erred in holding that the respondent, City of Newark, as successor in title to the Canal Company, acquired a good and valid title to the land in question herein from the State.

11. Because the findings, holdings and decision of the Court are each and all against the weight of the evidence.

12. Because the findings, holdings and decision of the Court are contrary to law.

13. Because the findings, holdings and decision of the Court amount to the taking of the private property and property rights of the petitioners herein for public use without just compensation, contrary to and in violation of Section 16 of Article 1 of the Constitution of the State of New Jersey.

14. Because the findings, holdings and decision of the Court amount to a deprivation of the natural and unalienable rights of these petitioners of "acquiring, possessing and protecting property" secured to them and to all inhabitants of the State of New Jersey under the provisions of Section 1 of Article 1 of the Constitution of the said State.

15. Because the Court erred in finding, holding and deciding that these petitioners were deprived of their vested rights in and to the land mentioned and described in the petition herein by other laws, to wit: those relating to the abandonment of the canal and the disposition of the canal property, which legislative enactments are, in effect, amendments to the Charter of the Canal Company, are *in pari materia* and should be construed together as a whole, for the reason that said legislative enactments amount to the divestment and deprivation of the vested interest and rights of these petitioners in and to the land mentioned and described in the petition herein, secured to them by the provisions of Article V, Section VII, paragraph 3 of the Constitution of the State of New Jersey.

16. Because the findings, holdings and decision of the Court amount to the taking of the property and property rights of these petitioners without due process of law, contrary to and in violation of the

5th and 14th amendments of the Constitution of these United States of America.

17. Because the Court erred in finding, holding and deciding that these relators were deprived of their vested rights in and to the land mentioned and described in the petition herein by other laws, to wit: those relating to the abandonment of the canal and the disposition of the canal property, which legislative enactments are in effect amendments to the Charter of the Canal Company, are *in pari materia* and should be construed together as a whole, for the reason that said legislative enactments amount to the divestment and deprivation of the vested interest and rights of these petitioners in and to said land, contrary to and in violation of the rights secured to them in and by the provisions of Paragraph 1, Section 10 of Article 1 of the Constitution of these United States of America.

18. The Courts below erred in their opinion and judgment in that said Courts decided an important question of law affecting the private property and the vested property rights of these petitioners and others in like circumstances and in like situation, contrary to the rule of the common law, contrary to and in violation of the statutes and precedents, and repugnant to and in violation of the Constitution of the State of New Jersey, repugnant to and violative of the Constitution of the United States of America, and contrary to the decisions of this Honorable Court, thereby creating, by precedent, a law of the State of New Jersey which is invalid for the reason that said law, so created and established:

(a) Amounts to the taking of private property for a public use without just compensation, contrary to and in violation of Section 16 of Article

1 of the Constitution of the State of New Jersey.

(b) Amounts to a deprivation of the natural and inalienable rights of these petitioners of "acquiring, possessing and protecting property" secured to them and to all inhabitants of the State of New Jersey under the provisions of Section 1 of Article 1 of the Constitution of said State.

(c) Amounts to the impairment of the obligation of an existing contract, thereby depriving these petitioners of their vested property and property rights, contrary to and in violation of the provisions of Article IV, Section VII, Paragraph 3 of the Constitution of the State of New Jersey.

(d) Deprives these petitioners of their property without due process of law contrary to and in violation of the fifth and fourteenth amendments of the Constitution of these United States of America.

(e) Permits the taking of private property for a public use without just compensation, contrary to and in violation of the fifth and fourteenth amendments of the Constitution of these United States of America.

(f) Impairs the obligation of an existing contract thereby depriving these petitioners of their vested property and property rights, contrary to and in violation of Section 10 of Article 1 of the Constitution of these United States of America.

19. The courts below erred in their opinion and judgment in that said courts decided an important question of law affecting the property and vested

property rights of a vast number of people, including these petitioners, to wit: all residents and citizens of the United States of America who have reversionary rights and interests in land, located in the State of New Jersey which have reverted or which will hereafter revert to them under existing contracts in the form of deeds conveying property for a public or semi-public use such as highways, streets, railroads, public buildings, churches, schools, parks, canals, libraries and other specific uses, where such deeds provide that the land shall revert upon the abandonment of such specific use, and thereby created and established, by precedent, a law of the State of New Jersey, which is contrary to the Rule of the common law, contrary to the statutes and precedents of the State of New Jersey, repugnant to and violative of the constitution of the State of New Jersey, repugnant to and violative of the Constitution of these United States of America and contrary to the rulings and decisions of this Honorable Court in that said law, so created and established

(a) Amounts to the taking of private property for a public use without just compensation, contrary to and in violation of Section 16 of Article 1 of the constitution of the State of New Jersey.

(b) Amounts to the deprivation of the natural and inalienable right of all persons in like circumstances with and of like situation to these petitioners of acquiring, possessing and protecting property, secured to them under the provisions of Section 1 of Article 1 of the constitution of the State of New Jersey.

(c) Amounts to the impairment of the obligation of an existing contract, thereby depriving all

those persons of like interest to and in like situation with these petitioners of their property and vested property rights contrary to and in violation of the provisions of Article IV, Section VII, Paragraph 3 of the constitution of the State of New Jersey.

(d) Deprives all of those persons of like interest to and in like situation with these petitioners of their property without due process of law, contrary to and in violation of the fifth and fourteenth amendments of the Constitution of these United States of America.

(e) Permits the taking of private property for a public use without just compensation, contrary to and in violation of the fifth and fourteenth amendments of the Constitution of these United States of America.

(f) Impairs the obligation of an existing contract thereby depriving those of like interest to and in like situation with these petitioners of their property and vested property rights, contrary to Section X of Article 1 of the Constitution of these United States of America.

Summary of Argument.

POINT I.

The judgment of the courts below is repugnant to and in violation of the Constitution of these United States of America, contrary to the constitution and laws of the State of New Jersey, the rule of the common law and the decisions of this Court, in that said judgment impairs the obligations of an existing contract, permits the taking of private property for a public use without just compensation and deprives these petitioners and others of their property without due process of law.

POINT II.

The Morris Canal has never been dedicated a public highway and the land here in question could not lawfully be dedicated to such purpose.

POINT III.

The canal property is no longer used for the purposes for which the Morris Canal and Banking Company had power to use the same by the true intent and meaning of its charter.

POINT IV.

The respondent, City of Newark, did not acquire the lands mentioned and described in the petition herein pursuant to the provisions of law.

POINT V.

The Morris Canal is not a public highway devoted to the public use.

Argument.

POINT I.

The judgment of the courts below is repugnant to and in violation of the Constitution of these United States of America, contrary to the constitution and laws of the State of New Jersey, the rule of the common law and the decisions of this Court in that said judgment impairs the obligations of an existing contract, permits the taking of private property for a public use without just compensation and deprives these petitioners and others of their property without due process of law.

In the presentation of this argument in the following manner the petitioners crave the indulgence of the Court for the apparent disregard of the rules of composition and rhetoric in the interest of brevity and conciseness.

Based upon the stipulation of agreed facts and the exhibits therein referred to and thereto annexed as stated and set forth in the record herein (R. 54 to 66), the deed made by Charles T. Shipman and others to the Morris Canal and Banking Company (hereinafter sometimes called "The Canal Company" on January 9th, 1830, was and is a contract because it is

> "an agreement upon sufficient consideration to do or not to do a particular thing". (2 Blackstone Comm. p. 442).

To same effect:

> *Charles River Bridge* v. *Warren Bridge*, 11 Pet. (U. S.) 420; 9 L. ed 773, 938;
> *Sturges* v. *Crowninshield*, 4 Wheat (U. S.) 122, 4 L. ed 529: 2 Kent Comm. 449.

A contract is also defined as:

> "A transaction between two or more persons in which each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other". Per *Washington J., in Dartmouth College* vs. *Woodward*, 4 Wheat (U. S. 518), 656, 4 L. ed 629.

The contract (R. 55-56) was made and entered into between Shipman and his associates and the Canal Company, and the State of New Jersey was not a party thereto having no interest therein whatsoever. By its terms the grantee took an estate in lands, upon a conditional limitation, to be used for canal purposes only, such estate to terminate when the Canal Company no longer had power to use the lands by the true intent and meaning of the act by which the Canal Company was incorporated (R. 56).

The reciprocal benefits accruing to the parties thereto by the terms of said contract were that the Canal Company thereby took the land for use as a canal so long as it had power to so use it and Shipman and his associates took a vested right in reversion in the said land to commence in possession upon the happening of the event in said contract specified, and such vested rights, in reversion, to the said land immediately, upon the execution and delivery of the said contract, became vested in said Shipman et als, and, upon the death of the said Shipman, said reversionary rights immediately vested in and enured to the benefit of his heirs at law and successors in interest.

In support of this claim, we quote from 16 Cyc. Estates, paragraph 6 Reversions, page 661, where it is said:

> "An estate in reversion is the residue of an estate left in the grantor, to commence in possession after

the determination of some particular estate granted out by him. It is a present vested estate although to take effect in possession and profit in future, and necessarily assumes that the original owner has not parted with his whole estate or interest in the land".

2 Blackstone, Com. 175 quoted in *Alexander* v. *DeKernel*, 5 Ky L. R. 382, 385;
Barber v. *Brundage*, 50 N. Y. App. Div. 123-125; 63 N. Y. Supp. 347;
Powell v. *Dayton, etc. R. R. Co.*, 16 Ore. 33-38, 16 Pacific 863.

A—Reversion is otherwise defined as:

"The return of an estate to the grantor and his heirs after the grant is over".

Booth v. *Terrill*, 16 Ga. 20-25; 4 Kents Comm. 352.

"What remains to the owner of an estate after he has parted with a portion of it, the possession of what thus remains being to return or revert to him upon the termination of the period for which the portion so parted with was to be enjoyed". 2 Washburn Real Property (6th Ed. 496).

"The residue of an estate left in the grantor to commence in possession after the determination of some particular estate".

Todd v. *Jackson*, 26 N. J. L. 525, 540.

B—Creation. A reversion is never created by deed or writing but arises by construction and operation of law and occurs whenever a grantor has conveyed less than his whole interest or estate.

Tinsman v. *Belvidere, Del. R. Co.* 25 N. J. L. 255 and 26 N. J. L. 148;
Beavers v. *Trimmer*, 25 N. J. L. 97.

The petitioners herein are heirs at law of and successors in interest to the said Shipman (R. 23-54) and are vested with the reversionary rights in and to the land mentioned in the said contract to the extent of 13/27th thereof (R. 28-62).

When in the year 1924, the canal was abandoned and closed to navigation by the enactment of Chapter 229 of the laws of 1924, App. 106, the canal, as such, ceased to exist. Its properties were sold in parcels as directed in and by said Chapter 229.

The respondent, City of Newark, acquired the right, title and interest of the Canal Company and of the State of New Jersey in and to the canal property which lies within the limits of the City of Newark (including the land here in question) and uses the land for a subsurface electric railway and a roadway on the surface thereof.

None of the property formerly held by the Canal Company is now used as a canal, and none of such property is now used as a highway of any kind except that part of the said property which is held by the respondent.

All of the things or matters mentioned in the said deed as qualifications, restrictions, or limitations have happened. The grantee, by virtue of said deed, took and occupied the land and used the same for the purposes designated in the deed, viz: for its canal, locks, towing path, toll houses, etc., until the canal was abandoned, by legislative direction, and upon such abandonment the land mentioned in the deed could not be and no longer was used for canal purposes, and thereupon, the purposes for which the land mentioned in the said deed might and should be used ceased to exist; therefore, the purpose for which the Morris Canal and Banking Company had been incorporated, and the purposes for which said land might or could be used, terminated, and the canal having been abandoned, closed to

navigation and dismantled, the grantee was thereby shorn of every vestige of power to use the said lands, by reason whereof time in the lands came to an end, the estate in the grantee terminated and the land reverted *ipso facto*, to the grantor, Charles T. Shipman, his heirs, assigns and successors in interest.

> "It is the general rule that the estate of the grantee continues for so long as he continues to use the property for the purpose specified, and the condition is violated when he ceases such use or abandons the purpose contemplated * * *". (18 C. J. 371, Sec. 406).

In support of this statement, the decision of the Court of Errors and Appeals of New Jersey in the case of *Oxford Board of Trade* v. *Oxford Iron & Steel Company* (81 N. J. L. 694, 80 Atl. 324) is cited. See also *Southard* v. *Central Railroad*, 26 N. J. L. 13, 2 Dutcher 20. *McKelway* v. *Seymour*, 29 N. J. L. 321, 5 Dutcher 328.

In discussing the character of title held by the *Morris Canal and Banking Company, Vice Chancellor Van Fleet in New Jersey Zinc and Iron Co.* v. *Morris Canal and Banking Company*, 44 N. J. Eq. 398 at 404; 15 Atl. 227, says:

> "The defendants under a deed conveying only a qualified fee, would, while their title continued, have the same right to the exclusive use and enjoyment of the land, and as complete dominion over it, for all purposes, as though they held it in fee simple absolute".

A similar question as to the character of title held by the Morris Canal and Banking Company was involved in the case of *State* v. *Brown*, 27 N. J. L. 13, where the Court, at page 20, said:

"By the terms of the conveyance the grantees take a qualified fee, liable to be defeated whenever they cease to use the land for the purpose specified in the grant. 1 Inst. 1, b 27 a; 1 Cruise 79 tit. 1, Sec. 82; 2 Bl. Com. 110."

The conveyance there referred to was to the Canal Company as long as used for a canal, and the Court said:

"There is no reservation in the deed. It conveys all the right, title and interest of the grantors in the lands and its appurtenances for the term specified in the grant, to wit, as long as used for said canal."

In the case of *Oxford Board of Trade* v. *Oxford Iron & Steel Co.*, 81 N. J. L. 694; 80 Atl. 324; the Court of Errors and Appeals said at page 695:

"The trial of the cause turned upon the question of the construction to be given to the condition subsequent contained in the deed, and that, concededly, was a Court question. *Smith* v. *Lunger*, 35 Vroom 539.

"While it is the undoubted rule that conditions of this character, which involve the forfeiture of an estate, are *stricti juris*, and to be construed strictly, they nevertheless must be interpreted in the light of the circumstances surrounding the grant and the clear and reasonable meaning of the language employed by the parties to manifest their intent. *Southard* v. *Central Railroad*, 2 Dutcher 20; *McKelway* v. *Seymour*, 5 Dutcher 328."

In the case of *Freeholders* v. *Buck*, 79 N. J. Eq. 472; 82 Atl. 418, the grant was for the use and purpose of building and erecting thereon public offices for the Clerk and Surrogate of the County of Cumberland. The habendum clause in the said grant was:

"To have and to hold the said lot of land, and the right to use the alley aforesaid, unto the Board of

> Chosen Freeholders of the County of Cumberland aforesaid, and their successors, and to their only proper use, benefit and behoof, so long as the same shall be used for the purposes mentioned and no longer" (p. 474).

Vice Chancellor Leaming writing the opinion points out that it was contended on behalf of the County that the language of the deed in question must be construed as a mere covenant, and as to this contention the learned Vice Chancellor said:

> "I think it is entirely clear that the deed vests in the grantees a determinable fee. *State* v. *Brown*, 27 N. J. L. 13, 20; 4 Kent Com. 10. A determinable estate may arise from and be dependent upon a condition, or it may be an essentially different estate arising from a limitation, the latter estate being sometimes called a conditional limitation" (p. 475).

The learned Vice Chancellor then quoted Washburn on Real Property as follows:

> "Where they circumscribe the continuance of the estate, and mark the period which is to determine it, they are words of limitation; when they render the estate liable to be defeated, in case the event expressed should arise before the determination of the estate, they are words of condition" (p. 476).

In that case the freeholders abandoned the building as offices for the Clerk and Surrogate, whereupon the heirs of the grantor made their claim to the property and the Court concluded as follows:

> "I reach the conclusion that when the County of Cumberland permanently abandoned the use of the lot in question for County offices an absolute title, as to the undivided one-half thereof, vested in the heirs of John Buck, deceased, by reverter" (p. 480).

Inviting the attention of this Court to the conveyance dated January 9th, 1830, made by Charles T. Shipman, and others, to the Morris Canal and Banking Company (R. 55), it will be noted that there are recitals from the statute incorporating the grantee making particular reference to the purpose of constructing a canal or artificial navigation between the Passaic and Delaware Rivers. The grant is of "all the said lands, necessary and proper to be taken and occupied by them for the purposes aforesaid". The habendum clause then reads:

> "To have and to hold the said lands and premises to the said The Morris Canal and Banking Company, their successors and assigns so long as the same shall be used for the purposes for which the Morris Canal and Banking Company have power to use the same by the true intent and meaning of the said Act."

While the conveyance in the instant case does not in words provide for a reversion to the grantor and his heirs, there does not seem to be any room for doubt that the conveyance creates a limitation in words, the legal effect of which is not distinguishable from that with which the Court concerned itself in the above cited case of *Freeholders* v. *Buck*, 79 N. J. Eq. 472, in which it was said:

> "The period named marks the limitation of the estate as to time; at the end of that period the determinable estate ceased and the fee vests in the grantor or his heirs, by reverter."
>
> "The words 'so long as the same shall be used for the purposes hereinbefore mentioned' are sufficient for the creation of a limitation, the added words 'and no longer' remove all possibility of doubt touching the quality of the estate granted."

Taking the history of the creation of the Morris Canal and Banking Company, its acquisition of property including that acquired from Shipman *et als.*, the construction and operation of the canal and eventual abandonment thereof; it is respectfully urged that the case of *Noble* v. *Oklahoma City*, 297 U. S. 481, 80 L. ed. 816, is as to comparable facts and applicable principles of law substantially identical with the case now before this court.

Briefly the parallel facts in that case are that the railroad company was authorized to acquire a strip of land for a railway and stations; lands were acquired from the owners by deeds or condemnation and with respect to the petitioners before the Supreme Court of the United States, they executed a deed to the railway company containing the following clause:

> "Being intended for the use and occupation of said party (grantee), its successors and assigns as and for its right of way for the constructing, operation and maintenance of its railroad and business at or upon the land hereby released and quit claimed; Provided, that in case of abandonment of said premises by said second party, its successors or assigns for the purposes above mentioned, the same shall revert to the grantors, their heirs or assigns."

Abandonment by the railroad company was by permission of the Interstate Commerce Commission and thereupon the railroad company executed a quit claim deed to the City for the abandoned portion. On proceedings in the United States District Court for the Western District of Oklahoma, there appears to have been an adjudication by that Court that the railroad company's title passed to the city under an Act of Congress of March 8, 1892; but those proceedings are in no way involved in these decisions of *Noble* v. *Oklahoma City* (*supra*) for the reasons

expressed by the Supreme Court that the petitioners were not parties to those proceedings in the United States District Court.

Thereafter the petitioners brought suit in the Courts of Oklahoma and judgments were rendered in favor of the City. On appeal the Supreme Court of Oklahoma affirmed the judgments.

Thereupon the petitioners applied to the United States Supreme Court for a writ of certiorari and that was granted.

The decision of the United States Supreme Court reversed the Courts of Oklahoma and incidentally reversed the United States District Court of the Western District of Oklahoma and remanded the causes to the Supreme Court of Oklahoma "for further proceedings not inconsistent with this opinion"; thereby of necessity invalidating the claim of the City of Oklahoma to title and right of possession in and to the lands in question.

So far as the instant case is concerned, the only question decided by the Supreme Court of the United States was on the controverted point as to whether "the only title the company acquired to its right of way, so far as the tracts in controversy are concerned, was that conveyed by the deeds of the petitioners' ancestors under both of which the title, on abandonment for railroad purposes reverted to their heirs or assigns."

On that point after discussing the facts and the applicable law, the Supreme Court says:

> "It follows from what has been said that the railroad derived title to the Noble lot by the deed of Naoma and George Noble of March 28, 1891. As no question is made but that the reverter clause in that deed became operative upon the abandonment of the line the Noble title is superior to that of the respondent."

The Courts below, however, in total disregard of the rights of these petitioners, have adjudged that:

(a) The canal here in question was a public highway both by express Legislative enactments and also its intrinsic use (R. 7).

(b) The abandonment of one use of a public highway for another consistent use does not work a reversion where the property was conveyed for a public highway (R. 7).

(c) There has been no change in the use of the lands as a public highway and therefore there was no reversion (R. 7).

By passing such judgment the Courts below decided an important question and created, by precedent, a law of the State of New Jersey which is contrary to the rule of the Common Law, contrary to the Statutes and precedents of the State of New Jersey, repugnant to and in violation of the constitution of the State of New Jersey, repugnant to and in violation of the constitution of these United States of America and contrary to the decisions of this Honorable Court in that the said law, so created:

(a) Impairs the obligation of an existing contract thereby divesting these petitioners of their property and vested property rights.

(b) Permits the taking of private property for public use without just compensation.

(c) Deprives these petitioners of their property without due process of law,

because as herein shown the canal is not a public highway either by express Legislative enactment or by its intrinsic use; the Canal Company had only an estate in fee simple defeasible, subject to the limitation expressed in the conveyance (R. 55-56); the canal was abandoned in 1924 by

Legislative authority (Chapter 229 of the Laws of 1924, App. 106); the canal is no longer an artificial navigation connecting the waters of the river Delaware with the tide waters of the Passaic River, and the land in question is no longer used for the purposes for which the Canal Company had power to use the same by the true intent and meaning of its charter; therefore, the land here in question has reverted to these petitioners who are heirs at law of and successors in interest to Charles T. Shipman, the original grantor to the Canal Company.

May it here be further urged that the Courts below, by their decision and judgment in the instant case have created, by precedent, a law of the State of New Jersey which not only effects the rights and remedies of these petitioners in the manner and to the extent above set forth, but such law, so created, likewise seriously affects like rights and remedies of a vast number of citizens and residents of the United States who have or who may hereafter have vested property rights in reversion in lands in the State of New Jersey which had been conveyed by their ancestors for public or semi-public use such as Parks, Schools, Colleges, Churches, Libraries, Highways, Railroads, Canals or Turnpikes, by deeds which, as in the instant case provide for a reversion in the lands upon abandonment or nonuser for the purposes therein specified.

Therefore, it is confidently asserted that the Courts below, in pronouncing the judgment in the instant case, have decided an important question of general law, which judgment and the law thereby created, is contrary to the rule of the Common Law, contrary to the precedents, statutes and the constitution of the State of New Jersey, is repugnant to and in violation of the Constitution of these United States of America and is contrary to the decisions of this Honorable Court.

POINT II.

The Morris Canal has never been dedicated a public highway and the land here in question could not lawfully be dedicated to such purpose.

It has been contended by the respondent, and in fact it has been held by the Courts below, that the Morris Canal has been lawfully dedicated to the public use as a highway, both by Legislative enactment and by usage.

This contention and ruling is erroneous. The Morris Canal has never been dedicated to the public as a highway, either by Legislative enactment or by usage.

In making the above mentioned contention and ruling the respondent and the Courts below apparently place great reliance upon the provisions of the Act by which the Morris Canal and Banking Company was incorporated (P. L. 1824, p. 158, App. 65), and particular reliance for such contention and holding seems to depend upon Section 25 of said Act of incorporation.

The respondent and the Courts below also apparently placed further reliance upon the case of *Barnett* v. *Johnson*, 15 N. J. Eq. 481, decided by the Court of Errors and Appeals in 1856, claiming that the decision in said case is the leading case in New Jersey designating the Morris Canal as a public highway.

To begin with, the above cited case is not in point with the case at bar, the action having been brought by the plaintiff for the purpose of determining his right to light and air, and it did not in any way involve a reversionary title. Much of the dictum in the opinion in said case, which is largely in question and answer form, tends to indicate that like the Legislature of New Jersey, which incorporated the Morris Canal and Banking

Company, the Court believed that the Morris Canal was esteemed to be a public highway, because in this opinion, which was so greatly relied upon in and by the Courts below, the Court in the cited case concludes all of its findings relative to property held by the Morris Canal and Banking Company by the use of the following language, which is found on page 484:

> "The charter vested in the company not merely a right to use it for canal purposes but the entire estate, right, property, and interest in the premises, so long as they shall be used for the purposes of the canal."

Section 25 of the Act incorporating the Morris Canal and Banking Company (P. L. 1824, p. 158, App. 80) reads as follows:

> "25. And be it enacted, that said canal when completed, shall, for ever thereafter, *be esteemed a public highway,* free for the transportation of any goods, commodities or products whatsoever, on payment of the tolls, and conforming to the regulations made or authorized by this Act and it shall be lawful for the Legislature of this State, at any time hereafter, to appoint three commisisoners for the purpose of fixing and regulating the tolls to be taken on said canal; which shall be done by the said commissioners in conjunction with two commissioners to be appointed by the company, unless the company should refuse or neglect upon due notice to appoint any commissioners on their part, in which case the said commissioners on the part of the State or a majority of them, shall fix and regulate tolls with due regard to the interests of the company and of the citizens of this State; provided always, that they shall not have power to reduce said tolls lower than one-half the greatest amount allowed by the 9th section of this Act, without the consent of the president and directors of the said company". (Italics ours.)

By no stretch of the imagination can it be said that the word "esteem" is synonymous with the word "dedicate". Webster's definition of the word "esteem" is as follows:

> "1. To set a value on, whether high or low; to estimate; to value.
>
> 2. To prize; to set a high value on; to regard with reverence, respect or friendship. When our minds are not biased, we always esteem the industrious, the generous, the brave, the virtuous, and the learned.
>
> 3. To hold in opinion; to repute; to think.
>
> 4. To compare in value; to estimate by proportion."

The definition given in Webster's Dictionary of the word "dedicate" is as follows:

> "2. To appropriate solemnly to any person or purpose; to give wholly or chiefly to".

And the synonyms thereto appear to be "consecrated"; "devoted"; "appropriated". But nowhere can be found the word "esteem" as a synonym for the word "dedicate".

Moreover, the word "dedicate" presupposes ownership of complete title.

In 1824 the Morris Canal and Banking Company was incorporated by the Legislature of the State of New Jersey. Neither the State nor its creature, the Morris Canal and Banking Company, was the owner of any property, and the Morris Canal and Banking Company did not become entitled to the use and occupancy of the lands here in question until in January of 1830, six years after the date of the incorporation of the Canal Company and the alleged dedication of the said lands, and the State of New Jersey at the time of the incorpo-

ration of the Canal Company or subsequent thereto had no ownership of the Canal property or of any property used in connection therewith, for which reason the State of New Jersey could not dedicate the canal for any purpose.

The definition of the word "dedication" as found in 18 C. J. page 38, Section 1, is as follows:

> "(Sec. 1) A. Of Common Law Dedication.
>
> 1. In General. Dedication is the appropriation or gift by the owner of land, or of an easement therein, for the use of the public. The doctrine of dedication rests upon public convenience and has been sanctioned by the experience of ages; it is based upon public policy and good faith, in that while securing to the public only such rights as it has honestly enjoyed or learned to depend on, it takes from the landowner nothing that he did not intend to give. * * * Dedication is essentially of the nature of a gift, although distinguishable therefrom, and inures to the benefit of the public as a grant".

The second definition which has been approved by the Court of New Jersey, is found in footnote 1 to the above quoted section, such definition being:

> "An appropriation of land to some public use made by the owner of the fee and accepted for such use by or on behalf of the public. *Hoboken M. E. Church* v. *Hoboken,* 33 N. J. L. 13".

The last quoted definition of "dedication" is concurred in by decisions of the Courts of almost every State of the Union.

Because of the fact that, as heretofore pointed out, at no time had the State of New Jersey owned the property over which the Canal was constructed, it was without authority to make any dedication whatsoever. Nor

could it lawfully make a dedication of a canal property in contemplation that it, the State of New Jersey, would later acquire the property over which the canal was constructed.

Relative to attempts to dedicate property to a public use before such property is owned by the would be dedicator, the remarks in 18 C. J. page 44, Section 17, are enlightening, the language of Section 17 being as follows:

> "(Sec. 17). B. Dedication before acquisition of title. 1. In General. When the dedication is made by one who at the time holds the fee simple to the land no question as to its validity on the ground of title can arise but as a general rule a dedication made before the dedicator acquires his title is not good in the absence of subsequent facts and circumstances constituting an estoppel unless he ratifies it after acquiring title, which of course he may do, or unless he has some kind of equitable title in or equitable grant to the land, this rule differing from the rule in the case of grants in which an after acquired title enures to the grantee by estoppel".

It has been previously pointed out that at no time did the State of New Jersey have any title to the land mentioned and described in the deed here under consideration, and it is equally true that the Morris Canal and Banking Company likewise had no title to said land. Furthermore, it is also true that when in 1923 the State of New Jersey allegedly acquired from the Morris Canal and Banking Company the properties of, and rights, titles, and interests in the Morris Canal, the State could only acquire and did only acquire such title, if any, to such properties as was then owned by the Morris Canal and Banking Company. The State could not possibly acquire any better title in any of the properties of the Morris

Canal and Banking Company than was possessed by that Company, so that the deed made by Shipman and others, containing the provision hereinbefore mentioned, and which conveyed an estate in fee simple defeasible, whatever right in such properties was acquired by the State was so acquired subject to the provisions of said deed of which the State is presumed to have had knowledge, because of the fact that the deed was a public record, filed and recorded in the office of the Register of Deeds of the County of Essex, New Jersey. It was contended by the respondents in the Courts below that the Canal property which was then held by the Morris Canal and Banking Company in trust for the State of New Jersey pursuant to the provisions of Ch. 229 of the Laws of 1924 (1937 R. S. 13:12-13 et seq. App. 106), had been dedicated to the public use as a public highway. This contention is untenable, because as has been previously pointed out dedication presupposes and in fact rests upon ownership of the fee. The State of New Jersey was not the owner of the fee in said lands in 1924 any more than it was the owner of the fee in said lands in 1824, and, therefore, could not dedicate land which it did not own. The only estate acquired by the State of New Jersey when it purchased the Canal properties from the Morris Canal and Banking Company and from its lessee the Lehigh Valley Railroad Company was such right, title or interest in and to any of such lands as was then held, owned and enjoyed by the Morris Canal and Banking Company or its said lessee, and it must be conceded that the State was bound to take notice and inform itself of any conditional limitation contained in any of the deeds to the Canal properties and is bound by such conditional limitations.

Moreover, by a careful study of the provisions of Ch. 229 (P. L. 1924) of the laws of the State of New Jersey (1937 R. S. 13:12-13 et seq. App. 106), it will be readily

found that the Legislature of the State of New Jersey never did and did not intend to dedicate the Canal property to the public use as a public highway.

It will be noted that nothing is mentioned in the title of the act constituting Chapter 229, P. L. 1924, (*supra*) which indicates that one of the purposes of the act is to dedicate the canal property to the public use for highway purposes. It will be further noted by an analysis of Sections 1, 2, 3, 4, 5, and 10, and it will inescapably compel the conclusion that the legislative scheme provided for the abandonment of the canal as a highway and the sale of the company's property with certain specific reservations for objectives inconsistent with highway uses. Such analysis of said sections of said act will show that they provided among other things, for the following:

Sec. 1. Authority and direction to discontinue the use as a means of transportation by water of that portion of the property, the title to which is vested in the said company in trust for the State of New Jersey, and all feeders to the canal. This section then continues as follows:

> "Such portions of such property shall be applied and are hereby dedicated, *subject to the limitations hereinafter provided*, to the public use as public highways for the transportation and passage thereon of persons and property and for any and all other purposes of public highways." (Italics ours.) (App. 107).

It, therefore, appears at the outset that only portions of the canal were dedicated; and even those portions, "subject to the limitations hereinafter provided".

It is a matter of public notoriety and knowledge that up to the time of the passage of this Act, the Morris Canal ran from the Delaware River to the Hudson River. Even by the language of this Act, all that portion of the

Morris Canal east of the west shore of the Hackensack River was excluded from any dedication whatsoever.

Sec. 2. This section dedicates certain waters, water rights, and lands under water to the public use.

Sec. 3. This deals exclusively with the authority to grant to municipalities, under certain conditions, a part of the water supply referred to in Section 2 to be diverted for the development of a municipal water supply.

Section Four. Authorizes and directs the sale of any and all property, the title to which is vested in the company in trust for the State of New Jersey, other than the right and property to be retained for public use as provided for in Section Two of this Act. Thus, by this section the company is authorized to sell all of the property, title to which is vested in the company in trust for the State of New Jersey, except that specified in Section Two. To this is added the provision respecting certain lands located so as to be capable of use in widening certain County roads. It should be noted that thus far by this Section Four all of the property of the Morris Canal and Banking Company, except that specified in Section Two of the act and so much as shall be acquired to widen County roads is not only authorized, but is directed, to be sold without in any way qualifying the purposes for which it shall be used (App. 108).

Section Four proceeds to describe the manner in which municipalities may acquire part of the Canal situated within their respective boundaries, and again excepting the provisions of Section Two. An examination of the authority, direction and privileges contained in the remainder of this Section Four will not only fail to support the argument that the Legislature intended to dedi-

cate this canal property to be limited to public highways, but on the contrary, uncontrovertibly demonstrates that no such limitation was intended because the Legislature, by the language of this Section, left it to the desire of the municipalities, expressed by resolution to set forth, "the purposes to which said municipality intended to devote such property when so acquired." To emphasize this point the section then further provides that, when the municipality shall have purchased such property "for any public use or uses, the property so purchased shall be applied to such public use or uses, or some of them, and such public use or uses shall supersede any other or different public use to which such property may have been theretofore dedicated" (App. 109).

Section Five refers primarily to the limitation as to time and conditions under which municipalities may exercise the rights and privileges set out in Section Four, etc. It then authorizes the company to "transfer the property in the manner hereinafter provided." That is to say: "In the first place" portions of the canal may be offered lying in any other municipality which shall have failed to take the necessary steps to acquire such property and which shall form a single continguous tract capable of the development for the purposes for which said first mentioned municipality shall have acquired its tract. "In the second place" if after a reasonable time after such offer, such municipality shall have failed to avail itself of said offer, then the company after advertisement shall sell any unsold portions of the canal property to the highest bidder deemed by the said Board of Directors to be responsible, at public or private sale. This, with only two provisos, first that said sale shall not be made unless first approved in writing by the Governor of the State, and second, that at any such sale any

municipality through which said canal may pass "may bid for any parcel of said canal so offered for sale" (App. 110).

Reverting to what is claimed by the respondent and the Courts below to be the effect of Section 1 of said Chapter 229, P. L. 1924, to dedicate the canal properties "to the public use as highways" (R. 9-10), the qualifying language "subject to the limitations hereinafter provided," is skillfully avoided in the insistence that the Legislature dedicated this canal as a public highway. The thereafter provided limitation in Section Five conclusively demonstrates that there was no dedication of the "Canal" as a public highway, and thus, because of the legislatively expressed limitations in the act itself which completely negative the intent, if any, to dedicate the Canal. Section Five of the act pertinent to this point reads:

> "Upon any such sale any previous dedication of the property so sold to any public use shall cease and be of no further force and effect and the purchaser shall be entitled to take and hold such property free from any previous dedication to any public use" (App. 111).

Hence, under such a sale the highest bidder would purchase, "free from any previous dedication to any public use."

The contention of the respondent regarding the effect of New Jersey State legislation concerning the Canal upon the property which forms the *locus in quo* must fail, and the judgment of the Courts below is erroneous.

As further evidence of the fact that the Legislature of the State of New Jersey did not intend to, and actually did not, dedicate to any public use the lands mentioned and described in the deed here under consideration, and as further evidence of the fact that the said Legislature

was well informed as to the reversionary rights of the grantors in said deed and others similarly situated, we respectfully invite the attention of the Court to the provisions of Section 3, of Chapter 78 (P. L. 1924) of the laws of the State of New Jersey (2-1924 Supp. C. S. 170; 144 J., App. 104).

It would indeed be a violent presumption that the Legislature had not before it, in the scheme for the abandonment of the canal as described by said Chapter 229, P. L. 1924 (1937 R. S. 13: 12-13 *et seq.*, App. 106), the extent and limitations of the rights and previleges of the Morris Canal and Banking Company, to be transferred to the State of New Jersey, as well also as the question as to what the grantor could grant and the grantee could acquire as property in fee simple absolute. To assume the negative would make meaningless provisions of Chapter 78, P. L. 1924 (2-1924 Supp. 17); 144h to J *et seq.* (App. 103), which provides, *inter alia,* for the purchase, by municipalities, of the right, title and interest in and to such property, the title to which is now vested in the Morris Canal and Banking Company in trust for the State of New Jersey; *and empowers the purchasing municipality to "acquire by gift, purchase or condemnation any reversionary and any other private rights in the property so purchased,"* and Section 10 of Chapter 229, P. L. 1924 (1937 R. S. 13:12-25, App. 113) (under the provisions of which chapter, the Morris Canal and Banking Company, as such trustee, sold its right, title and interest in and to canal property), which provides, *inter alia* "any instrument of conveyance executed by the Morris Canal and Banking Company, pursuant to any of the provisions of this act, *shall operate to convey all the right, title and interest of the said company and of the State of New Jersey*" (Italics ours). If the company or the State had a fee simple absolute, is it not reasonable to assume that the Statute would have provided for the

conveyance of the property and not the right, title and interest therein?

Thus the power to convey after abandonment "the right, title and interest" of the Morris Canal and Banking Company, trustee for the State of New Jersey to the respondent, City of Newark, conveyed no more than the Morris Canal and Banking Company could have conveyed if it had abandoned the canal without legislative assent. Upon abandonment, the period of limitation set out in the Shipman conveyance had expired and the reverter became effective by force of law; so that a conveyance by the corporation, as trustee or otherwise, of the right, title and interest could not create a new estate in the grantee because that would be tantamount to an attempted conveyance by the Legislature of property which neither it as a representative of the people nor the State of New Jersey own.

Hence the lands conveyed by Shipman and others to the Morris Canal and Banking Company mentioned and described in the deed here under consideration, reverted to the said Shipman, his heirs and successors in interest by operation of law when the said lands ceased to be used for a canal.

POINT III.

The canal property is no longer used for the purposes for which the Morris Canal and Banking Company had power to use the same by the true intent and meaning of its charter.

The deed made by Shipman and others to the Morris Canal and Banking Company, after reciting that, under the act incorporating the company, "the Morris Canal and Banking Company are authorized to construct and make

a canal or artificial navigation to connect the waters of the Delaware River near Easton with the tide waters of the Passaic, and to take, occupy, possess and enjoy all such lands as may be necessary and proper to be taken and occupied by them for the said canal and its necessary locks, towing paths, toll houses, offices, works and devices", proceeds to convey the premises in question by a deed containing the following habendum clause: "To have and to hold the said lands and premises to the said, the Morris Canal and Banking Company, their successors and assigns, so long as the same shall be used for the purposes for which the Morris Canal and Banking Company have power to use the same by the true intent and meaning of the said Act" (R. 55-56).

What these purposes were is set forth very clearly in the Act. The title of the Act itself describes it as "An Act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers". In order to dispel all doubt or misconception as to the intent of the legislators to confine the operation of the canal property to one purpose and one purpose only, Section 27 of the Act provides specifically for the manner in which the Act should be construed. It should be so construed, said the Legislature, that (App. 81):

1. The corporation "shall not be authorized to take or appropriate to the use of the said canal or under color or pretense that the same are necessary therefor, any lands, waters or streams of water, but such only as are actually necessary for the erection and use of the said canal for the purposes of navigation only".

2. The corporation shall not be authorized to sell any lands or waters "taken or acquired for the use of said canal as aforesaid", with certain exceptions.

3. The corporation or any other person shall not be authorized to use or appropriate any part of the waters for "mills or any other purpose than the mere navigation of said canal".

So in the Act itself, we find a definite object clearly expressed, and fortified by the determination of the legislators to avoid all possibility of mis-construction by setting forth clearly and unequivocally their intent to confine the operation of the property to be acquired by the Morris Canal and Banking Company to "the purposes of navigation only".

It is obvious that, when the grantors in the Shipman deed to the Canal Company conveyed the property by a deed with a habendum clause granting the company the right to have and to hold the premises "so long as the same shall be used for the purposes for which the Morris Canal and Banking Company have power to use the same by the true intent and meaning of said Act", the limitation imposed upon the estate granted by the deed was clear. The "purposes" referred to related wholly to the navigation of the canal. So long as the property was used for navigation purposes, title was to vest in the grantee. If the canal should at any time be abandoned so that navigation should cease, then title was to revert to the original grantors or their heirs and survivors in interest.

That it is conceded by the respondent that the canal was abandoned appears from the statement of facts (R. 59).

In 1922 an act was passed (R. 57-5) authorizing the acquisition of the canal by the State. The following year all the canal property, including all of the right, title and interest of the Morris Canal and Banking Company in and to the premises in question, was conveyed by the Morris Canal and Banking Company and by its lessee, the

Lehigh Valley Railroad Company, to the State of New Jersey (R. 58). By an Act passed the following year (L. 1924, Ch. 78, p. 151, App. 103), it was provided that upon the abandonment by lawful authority of navigation upon the Morris Canal, the City within which any canal property is located might acquire for public use such parts of the canal property as might be located within its boundaries (R. 58-59). Then followed legislative direction to discontinue transportation by water and to drain the canal (R. 59); after which there followed the conveyance to the City of Newark of all of the right, title and interest of the Morris Canal and Banking Company in and to the canal property within its borders, including the premises in question, and the construction of an electric railway upon certain lands, including the property that the ancestor of relators had originally conveyed to the canal company to be held by it so long as the said Morris Canal and Banking Company shall have power to use the same by the true intent and meaning of its act of incorporation. And it is conceded by the respondents that the property formerly occupied and used as the Morris Canal is no longer used for navigation purposes only, but is used for a street railway and for vehicular traffic on the surface thereof (R. 59).

POINT IV.

The respondent, City of Newark, did not acquire the lands mentioned and described in the petition herein pursuant to the provisions of law.

The claim of the respondent herein and the opinion of the Courts below appear to rest the acquisition of the property in question by the City of Newark upon its authority of Ch. 78, P. L. 1924, (App. 103). It must

be assumed that counsel are thereby asserting that that Chapter is authority for the conveyance by the Canal Company as trustee for the State of New Jersey of parts of what the Legislature in 1824 "esteemed" the canal, when completed, to be a public highway, and that the subsequent Legislature by the enactment of Ch. 229, P. L. 1924, (App. 106), in Section 1, dedicated the said canal to the public use as public highways. If the respondent, the City of Newark, and the Courts below, rest the character of the title upon the provisions of Ch. 78, P. L. 1924, *supra*, it will become immediately apparent that this Act enabling cities, etc., to acquire portions of the canal property upon the abandonment of navigation upon the Morris Canal contains no such limitation or restriction as is argued for the respondent in support of its contention that the Morris Canal was established as a public highway and continued to be such regardless of the abandonment of navigation on the said canal.

This is confidently asserted to be an inescapable conclusion from the very language of Section 1 of this Act (Chapter 78) wherein the power and authority is given to municipalities "to acquire for public use, such parts of said canal property as may be located within its boundaries", and very expressly negativing any inference that the Legislature intended such acquisition to be limited to use as public highways. This section provided that a municipality might adopt a resolution expressing its desire to acquire such portion of the canal property and setting forth the purpose for which it is intended to devote such property when acquired.

The second section of said Chapter 78 further demonstrates that it was the legislative intent to have the canal property disposed of to a municipality in which the canal property does not lie in the event that the municipality in which the canal does lie has failed or refused to acquire

it under Section 1. And the only limitation upon the use of the canal property in such event is that it shall form a single tract contiguous with the canal property lying within the municipality seeking to acquire it, and is capable of development "for the purpose for which said municipality intends to acquire the canal property within its borders".

Aside from the unequivocal language of the statute hereinabove referred to, it becomes manifest upon reading the provisions of Section 3 of the Act that the Legislature did not intend to make a dedication of the canal property as a public highway or for any public use in disregard of reversionary and other private rights in the property so purchased by municipalities. For the convenience of the Court, Section 3 of said Chapter 78 of the Laws of 1924 is here quoted as follows:

> "3. Any municipality, county or counties which shall purchase any such property may acquire by gift, purchase or condemnation any reversionary and any other private rights in the property so purchased * * *".

The Legislature of 1924 as well as its predecessors had before them the official report of the committee acting under legislative authority and appointed by the Governor showing that the Morris Canal and Banking Company was occupying lands to which it had only base or qualified fee with reversion to the grantors upon abandonment of navigation (R. 63).

Unless that be assumed without the necessity at this time of proof of public records in this State, the inclusion of the provision in Section 3 of this statute providing for condemnation proceedings to acquire reversionary and other private rights, would amount to an absurdity.

In passing it may be properly suggested with respect to the attempt in that section to limit the value of such private rights to the subject to a use to become non-existent as that former use shall have compared with the new public use for which the same shall be taken by a municipality was beyond the power of the Legislature, and it is elementary that just compensation for the taking of private property for public use could not be constitutionally arrived at in any such manner; and the Legislature seems to have been at least apprehensive of that danger in providing as it did in the remainder of said Section 3 as follows (App. 104):

> "* * * and in all such cases of condemnation the value to be paid to the owner of such reversionary or other private rights shall be the value of such rights subject to the continued use of the property for canal purposes together with the damage, if any, arising out of the change from the use for canal purposes to the public use for which the same shall have been taken by such municipality. If in any such case of condemnation it shall be determined that the rule of valuation in the act prescribed invades the constitutional right of compensation of any private owner, the measure of compensation shall be modified accordingly and the residue of this act shall not fail."

What has heretofore been said concerning Chapter 229, P. L. 1924 (App. 106), further emphasizes the intention of the legislature as expressed in Chapter 78 (*supra*), because the legislative authority under Section 10 to convey any or all of the canal property limits the Morris Canal and Banking Company as trustee for the State of New Jersey to conveying only the right, title and interest which such trustee has.

Chapter 78 having become effective before Chapter 229, it must further be presumed that the same legisla-

ture had in mind the reversionary and other private rights in these canal propeties when it so limited the trustee in the matter of conveyance.

Therefore, the respondent, City of Newark, did not acquire the land mentioned and described in the petition herein pursuant to the provisions of law.

POINT V.

The Morris Canal is not a public highway devoted to the public use.

It has been heretofore shown that the Morris Canal properties have never been lawfully dedicated as a highway for the public use. In an attempt by the respondent and the Courts below to make some kind of a showing to the contrary, they seem to place reliance upon a number of cases (R. 9-10), none of which are in point and all of which deal with subjects entirely unrelated to the matter at Bar, in that none of such cited and relied upon cases deal with lands the title to which was held as an estate in fee simple defeasible, as is the case here, but to the contrary all of such cited and relied upon cases deal with lands taken by condemnation or with lands which had been acquired by the canal company upon the payment of full value therefor or concerning the right of an adjoining tenant to light and air. The respondent and the Courts below seem most strongly to rely upon the case of *Barnett* v. *Johnson,* 15 N. J. Eq. 481, decided by the Court of Errors and Appeals in 1856. At the time of the writing of the opinion in this case and as stated therein it is true that the Morris Canal was then in full operation as a highway, and that it was by Section 25 of the Charter of the Canal Company esteemed to be such public highway free for the transportation of goods and com-

modities upon the payment of tolls, and it is conceded by the petitioners that so long as the Morris Canal remained in full operation it had complete dominion over the lands mentioned in the deed made by Shipman and others to the Morris Canal and Banking Company (R. 55-56), but that when the canal was abandoned the land mentioned and described in said deed by the terms thereof and by operation of law reverted to the grantor, his heirs, and successors in interest.

During the time in which the Canal was operated and while it continued in such operation it was, as stated in Section 25 of the Act incorporating the Morris Canal and Banking Company (P. L. 1824, p. 151), esteemed to be a public highway (App. 80).

It has been heretofore pointed out that there is a vast difference in the meaning of the words "esteem" and "dedicate."

In making this enactment the legislature merely evidenced an intent to control the company which operated the canal so as to prevent discrimination between those who used the same.

It should be borne in mind that the Morris Canal and Banking Company was a private corporation and was not connected or associated with the State by any lawful ties other than that the Morris Canal and Banking Company was the creature of the State endowed with a franchise to operate a public convenience, and is not to be compared in any sense with the Highway Department of the State which operates highways for the public use, because the said highway commission or department has been declared by the laws of this State to be the *alter ego* of the State of New Jersey for the purpose of maintaining highways for the public use. But the highway maintained by the Morris Canal and Banking Company was not a public highway in the sense that highways maintained by the State or by its *alter ego* are such.

In the matter of *Pittsburgh & Lake Erie Railroad Company* v. *Bruce*, 102 Penn State Rep., 23, a canal company was chartered by the State and the canal was declared by legislative act to be a public highway whereon any one might travel on payment of tolls. The canal company, having become insolvent, all of its property and franchises were sold to a railroad company by order of Court. It was held that the railroad company could not construct its tracks on the right of way acquired by the canal company without making compensation to the owner of the land. In that case the Court said (p. 34):

> "But it is urged that, by the Act of the Legislature the Pennsylvania and Ohio canal was made a public highway, and that therefore the State had the undoubted right to grant the use of that highway to the present corporation, and that without compensation to anyone. But this proposition is founded on a premise that will not bear scrutiny. In the first place, this public highway belonged to a private corporation, and it was public only in this, that the public had the right to use it by paying the tolls which the company might see fit to charge. It was a public highway in the sense that a tavern is a public house. Anyone may float a boat over the one under the same conditions that he may stop at and demand entertainment in the other, that is by paying the proper charges. Thus, whilst the canal company held its franchise subject to a qualified right, yet its navigable way was its own property, and was by no means like a common lot or street over which the commonwealth has the exclusive control and which it may devote to corporate uses."

Reverting for the moment to the case of *Barnett* v. *Johnson*, above cited, we find the following pertinent language of this Court at page 484:

> "The charter vested in the company not merely a

> right to use it for canal purposes, but the entire estate, right, property and interest in the premises, *so long as they shall be used for the purposes of the canal.*" (Italics ours.)

It is indeed difficult to reason out why distinguished counsel for the respondent and why the Courts below should cite the case of *Strock* v. *East Orange*, 80 N. J. L. 619, 37 Atl. 105) as authority for what the City of Newark claims as a right to occupy and hold the lands of the ancestor of these petitioners. Mr. Justice Parker, speaking for the Supreme Court in that case said, *inter alia*, at page 624:

> "We think it is true that after the land is dedicated to public use for certain purposes, it is not within the power of the municipality to divert such land to other purposes without first exercising the right of eminent domain and paying to the owner of the fee a proper compensation therefor. But when the land has been acquired for public use, as for a park, by condemnation and payment to the owner of full value or by sale and purchase, it seems to be competent for the Legislature to authorize it to use it for other purposes. *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 235".

So, likewise, as to the case of *Carroll* v. *Newark*, 108, N. J. L. 323, 158 Atl. 458). There the Court of Errors and Appeals is dealing with land acquired by the City of Newark by condemnation under the legislative authority and paying "the full price of the land", intending to and taking title in fee. Under these circumstances the Court of Errors and Appeals said that having thus acquired the fee under authority of eminent domain for one public purpose, the municipality was not precluded from utilizing such land for another public purpose.

In neither of the above cited cases was the question before the Courts as to the right of a vendee acquiring the

right, title and interest of the vendor as trustee, either to change the utility of private property or to take private property to public use without paying just compensation. There is no controversy between counsel respectively as to what the case of *Frelinghuysen* v. *State Highway Commission*, 108 N. J. L. 403, 158 Atl. 465 has decided; if counsel for the respondent limits himself to what the Court there decided respecting the character of the title acquired by the State under condemnation proceedings. What the Court said on that point is as follows:

> "When the State takes the property of its citizens for highway purposes, it acquires an easement only and it would seem that it is empowered to take only so much of the title as is essential to the public use authorized".

Mr. Justice Lloyd speaking for the Supreme Court in that case made this interesting observation (107 N. J. L. 222, 152 Atl. 79):

> "Public uses are constantly changing and particularly with regard to the lands occupied by our highways; the course or direction of the highways are frequently altered and upon the abandonment of such lands for such use, unless the State holds a greater title by the voluntary act of the owner, the easement ceases and the State has no further interest".

May the attention of the Court be called to the fact that by reference to the affirmance by the Court of Errors and Appeals, this case was affirmed for the reasons expressed in the opinion delivered by Mr. Justice Lloyd in the Supreme Court.

Referring to the opinion of Vice Chancellor Backes in *Gill* v. *Ferrone* (unreported), a reading of that opinion demonstrates that the learned Vice Chancellor was not dealing with a base or qualified fee, but that the land was acquired by condemnation which presupposes that just compensation had been paid. In further considering that

opinion it should be observed that the only issue before the Vice Chancellor was the common law right of light and air; and what is said in the opinion concerning Chapter 229, P. L. 1924, App. 106, is dictum.

In support of the claim made by these petitioners that the lands mentioned in the petition herein reverted to them as heirs and successors in interest of Charles T. Shipman by operation of law when the lands ceased to be used for a canal, we beg leave to cite *Noble* v. *Oklahoma City,* 297 U. S. 481, 80 L. Ed. 816; *Cornelius* v. *Ivins,* 26 N. J. L. 376; *United States Pipe Line Co.* v. *Delaware, etc. R. R. Co.,* 62 N. J. L. 254 at 267; 41 Atl. 759; *Farnum* v. *Loomis,* 2 Ore. 29, 32; *Freidman* v. *Steiner,* 107 Ill. 125-131; *Ernst* v. *Little River Land Co.,* 109 Tenn. 427, 535; *State* v. *Alter,* 80 Neb. 405, 407; 114 N. W. 293; *New Cathedral Cemetery* v. *Browning,* 138 Atl. (Md.) 258 at 260; *N. J. Zinc & Iron Company* v. *Morris Canal and Banking Company,* 44 N. J. Eq. 398 at 404, 15 Atl. 227; *State* v. *Brown,* 27 N. J. L. 13; *Oxford Board of Trade* v. *Oxford Iron & Steel Co.,* 81 N. J. L. 694, 80 Atl. 324; *Bouvier* v. *Baltimore & N. Y. Ry. Co.,* 67 N. J. L. 281, 51 Atl. 783; *Carr* v. *Banghart,* 112 N. J. L. 324, 170 Atl. 620; *Freeholders* v. *Buck,* 79 N. J. Eq. 472, 81 Atl. 418.

The petitioners respectfully urge that neither they nor their ancestor had or could have had any dominion over the lands conveyed to the Canal Company so long as they continued to be used for canal purposes; but it is equally certain that instantly upon the cessation of that use the period of limitation in the conveyance set forth had arrived and title reverted to the grantor and to his heirs and successors in interest.

Such property as the Canal Company had, unencumbered by limitations or by conditions subsequent, it could and did sell to the State of New Jersey, but it cannot be controverted that the Canal Company could not sell to the State of New Jersey nor hold as trustee for the State

of New Jersey any greater quantum of title than it possessed.

The petitioners have hereinbefore referred to, and in the record have set out at length, the deed which forms the basis of their contention that the property mentioned in said deed reverted to them by operation of law upon the abandonment of the canal. We take the liberty of again here pointing out that the said deed restricts the use of the lands thereby conveyed and limits the time in the lands by the wording of the habendum clause which reads as follows:

> "To have and to hold the said lands and premises to the said, The Morris Canal and Banking Company, their successors and assigns, *so long as the same shall be used for the purposes for which the Morris Canal and Banking Company have power to use the same by the true intent and meaning of the said Act.*" (Italics ours.)

The words in the above quoted habendum clause "the said Act" unquestionably and uncontrovertedly refer to the Act by which the canal company was incorporated (P. L. 1824, p. 158, App. 65). Thus, the land granted was restricted as to the use thereof to the only one purpose for which the canal company was authorized to take and use the land, that is, for the use of the canal. By reference to 9 C. J., page 1128, third paragraph of Section 8, we find the following:

> "Restriction on use of lands. The fee simple may be limited to the use or purpose of navigation and when so restricted the company cannot use the property for other purposes." *Bostock* v. *North Staffordshire R. Co.*, 4 E and B 798; 82 E. C. L. 798; 119 Reprint 295; *Badger* v. *South Yorkshire R., etc., Co.*, 1 E and E 347; 102 E. C. L. 347; 120 Reprint 939.

The estate in said land having been created with re-

liance upon the 1824 statute above referred to, the heirs or successors in interest of the grantor cannot now be required to part with their property nor may they be deprived thereof by amendments to said law or by supplements thereto, or by any new statute enacted subsequent to the making of the said deed, and are therefore not bound by the provisions of the statutes enacted in 1922, 1923 and 1924. The land reverted to the heirs and successors in interest of the grantor thereof upon the abandonment of the canal, and neither the canal company nor the State of New Jersey has any right, power or authority to deprive these petitioners of their property without just compensation.

Another condition which exists relative to the Morris Canal which should conclusively demonstate that the Morris Canal regardless of what its status may have been prior to the enactment of Chap. 229, P. L. 1924 (1937 R. S. 13:12-13, App. 106), it certainly cannot by any stretch of the imagination now be or be considered as a public highway because it is not only a matter of fact, but it is also recognized by law that a highway to maintain its status as such must remain and continue to be one continuous strip of land connecting two designated points.

It was ordained by the Legislature of the State of New Jersey when the Morris Canal was incorporated, and by the Act of incorporation, that the Morris Canal should be a continuous navigable strip connecting the waters of the Delaware river at Easton with the tide waters of the Passaic river.

Since the abandonment of the canal by legislative authority in 1924, and in accordance with such legislative authority, the said canal has been dismantled and closed to navigation, and only that portion of the canal which lies within the boundaries of the City of Newark is now used for highway purposes. The remainder of the canal properties have been sold off to various munici-

palities for various purposes, and those portions sold to municipalities and others, aside from that property, the right, title and interest to which was sold to the City of Newark, are not used for highway purposes.

It is, therefore, contended by the petitioners that the canal as a highway no longer exists, and that it ceased to exist by legislative authority, whereupon the land mentioned and described in the deed here under consideration reverted to the heirs and successors in interest of the grantor Charles T. Shipman.

CONCLUSION.

For the reasons heretofore stated and for the protection of the property and vested property rights of these petitioners and all other persons in like situation and in like circumstances, it is respectfully submitted, that the Writ of Certiorari should issue as prayed for in the petition and the judgment of the courts below should be vacated and set aside, and that these petitioners should be granted such other and further relief as justice may require.

Respectfully submitted,

HOLMES, ROGERS & CARPENTER,
By Oliver C. Carpenter,
A member of the firm,
Attorneys for Petitioners,
No. 42 Broadway,
New York, N. Y.

Wm. E. Clark,
Charles P. Rogers,
of New York, N. Y.,

Raymond H. Cohn,
of Newark, N. J.,

James D. Connell,
of Hoboken, N. J. and

Victor Ruskin,
of Jersey City, N. J.,
Of Counsel.

APPENDIX.

Laws of 1824, Page 158.

AN ACT to incorporate a company to form an artificial navigation betwen the Passaic and Delaware rivers.

WHEREAS the construction of a Canal to unite the river Delaware near Easton, with the tide water of the Passaic, will be of great public benefit and advantage to the people of New Jersey; now therefore, in order to secure to the state the results of this public work, and also as an inducement to a company to engage in this important undertaking, and in consideration of the risks and ependitures which they may encounter in its execution and operations.

THEREFORE—

1. BE IT ENACTED by the Council and General Assembly of this State and it is hereby enacted by the authority of the same, That Jacob S. Thompson, of Sussex, Silas Cook, of Morris, John Dow, of Essex, Charles Board, of Bergen, and all and every other person or persons who may become subscribers according to the mode hereinafter prescribed, their successors and assigns shall be, and are hereby incorporated by the name of the "Morris Canal and Banking Company", for the purposes, and with the privileges and immunities, hereinafter described, defined and granted, and by that name shall be a body corporate and politic in law, and shall and may sue and be sued, implead and be impleaded in courts of justice or in any other place whatsoever; and that the said company shall have power and authority at any time after the passage of this act to purchase, receive in donation, possess, enjoy and retain, demise, grant, alien and sell all such lands, tenements, hereditaments, waters, streams, and water privileges, rights, goods, chattels and effects of every description

whatsoever, as may be necessary for carrying into effect any of the provisions of this act, and under the restrictions and limitations therein mentioned; and that the said company shall have perpetual succession, and power to make and use a common seal, and the same to change and renew at pleasure; and also to adopt, establish and carry into execution such by-laws, ordinances and regulations, as shall, by its president and directors be judged necessary or convenient for the said corporation, in respect to its canal and banking operations hereinafter mentioned; and the same to change, alter, repeal, annul and re-enact, provided the same be not contrary to the constitution or laws of the United States, or of the State of New Jersey.

2. And be it enacted, That George P. M'Culloch, and John Scott, of the county of Morris, Israel Crane, of the County of Essex, and Joseph G. Swift, Henry Eckford, and David B. Ogden, of the City of New York, be, and they are hereby appointed commissioners for receiving subscriptions for the sum of one million of dollars, to constitute the capital stock for the canal aforesaid, in shares of one hundred dollars each; and that the said commissioners, or a majority of them, shall and do open books for that purpose, at such time and in such place or places, within this state, as they shall designate by public advertisements, to be previously inserted for at least three weeks, in a public newspaper printed in Morristown, Newark and the City of New York, respectively, and shall continue the same open until the said capital stock shall be subscribed, or at their discretion close the same, after they shall have remained open two days, and again open the same at some other time or times, place or places, giving public notice thereof as aforesaid; and the sum of ten per cent. upon each share so subscribed, shall be paid in specie, or in the bills of banks which redeem their bills with specie, by each subscriber, at the time of subscription to the said commissioners, or a majority of them, and the amount so received at the time of subscription, shall, by

the said commissioners, or a majority of them, be deposited in such bank or banks, as the said commissioners, or a majority of them may elect in their joint names, there to remain until the same shall be by them paid over to the directors of the said company, to be appointed as hereinafter directed; and that the said directors, when so appointed, shall have power, and they are hereby authorized to call upon the said subscribers for the payment of farther instalments, in such sum or sums, at such time or times, and under such forfeiture or forfeitures as they may deem expedient, until the whole amount of the said shares so subscribed shall have been fully paid.

3. And be it enacted, That the management of the concerns of the said company shall be, and the same is hereby vested in fifteen directors, to be selected from the stockholders; and that the said directors shall choose, by plurality of votes, a president from among themselves; and as soon as conveniently may be, after the said stock of one million of dollars shall have been subscribed, the before named commissioners, or a majority of them, shall convene the said stockholders, by public notice, to be given as aforesaid, and at such time and place as they shall designate in said notice, to choose the first board of directors, who shall hold their offices until the first Monday of April, eighteen hundred and twenty-six; and if for any cause whatsoever, an election of directors should not be made on the day whereon, in pursuance of this act, it ought to be made, the said corporation shall not for that cause be deemed dissolved, but it may be lawful at any other time to hold such election, public notice of the time and place being previously given as aforesaid, and until such election be made, the president and directors, for the time being, shall continue in office, provided such election be held before the first day of January next ensuing the stated day of election; and in case of the death, resignation, incapacity, or removal of the president, or of one or more of the directors, the vacancy thereby oc-

casioned may be supplied by appointments to be made by the board of directors; and at all elections of directors, each stockholder shall be entitled to one vote for every share of stock by him or her held.

4. And be it enacted, That no state, county, township, or other public assessments, taxes or charges whatsoever, shall at any time be laid or imposed upon the said canal company, or upon the stocks and estates which may become vested in them under this act; but this exemption shall not extend to any other estate or property of the company, than such as is possessed occupied and used by the said company for the actual and necessary purposes of said canal navigation under this act, according to the true intent and meaning thereof; and no tax shall be imposed upon any property of said company or of other persons transported or used upon or about said canal of greater amount according to the value of the article taxed than shall at the same time be imposed upon the property of the same or similar kinds in the State of New Jersey.

5. And be it enacted, That it shall be lawful for the said company to construct, make and execute a canal or artificial navigation, to connect the waters of the Delaware river near Easton, with the tide waters of the Passaic river, and passing through the County of Morris, with all the locks, works, devices, wharves, toll houses and offices, necessary for the use of said canal; and it shall and may be lawful for the said company by its president and directors, and by any agent, engineer, superintendent or contractor or any other person or persons employed in the service of said company, to enter from time to time and at all times upon all lands, whether covered with water or not for the purposes of exploring or surveying the route or routes for said canal, and locating the several works as above specified; doing thereunto no unnecessary damage, and when the said route or routes shall have been fixed upon, and its several works located by the president and direc-

tors or a majority of them, and a survey thereof deposited in the office of the secretary of state, then it shall be lawful for them and for any agent, superintendent, engineer, contractor or any person or persons employed in the service of said corporation, at any time to enter upon, take possession of, and use all and singular such lands, water and streams, subject to such compensation to be made therefor as is hereafter directed.

6. And be it enacted, That where lands, waters and streams that may be useful for said canal, shall not be made a free gift by their owner or owners, to the said company, then the company shall pay to the owner or owners, such compensation, as shall be mutually agreed upon; and in case of disagreement in relation to the value of such lands, waters and streams, or in case the owner or owners thereof be *feme covert* and under age, *non compos mentis*, or reside out of the state, then it shall be lawful to, and for the aforesaid president and directors, from time to time, to cause a survey or surveys, and map or maps, to be made of any of the lands, waters, and streams, in their estimation requisite and not given as aforesaid, and which they are authorized by this act, to take for the uses aforesaid; in the field book of which map and survey or maps and surveys shall be distinguished the land or waters of each of the several owners and occupants, appropriated or intended to be appropriated as aforesaid, and the quantity thereof, and shall exhibit the same, to one of the justices of the supreme court, in this state, not being a stockholder, (having given at least ten days previous notice, in writing to the parties concerned, if resident in the state, and by publication in at least two gazettes published in the counties to be traversed by the canal, of the time and place of such exhibition,) such book and map being accompanied by the oath or affirmation of one of the engineers, employed by said company, that the premises therein described are required to be occupied by the company, for the purpose of carrying into

effect the object set forth by this act, and are not more than is requisite for the said uses; and thereupon it shall be the duty of said justice to certify such map and book under his hand and seal, and to cause the same to be filed in the office of the clerk of the county, where such land, water, or stream, may be situated, there to remain a public record; and it shall also be the duty of the said justice, at the time and place aforesaid, by a writing under his hand and seal, to appoint three discreet and disinterested freeholders, chosen from some county or counties not intersected by the canal, as appraisers, who shall, before they enter upon the duties of their appointments, severally take and subscribe an oath or affirmation before some person authorized to administer oaths, faithfully and impartially to perform the duties required of them by this act, and shall receive such compensation to be paid by the said company, as the justice by whom they are appointed shall determine; and it shall be the duty of said appraisers, or a majority of them, if requested so to do, by the owner or owners, or by the company to make a just and equitable estimate and appraisal of the value of the lands and damages to the several owners, proprietors or parties interested in the premises so required, for the purposes aforesaid, the said appraisers having given ten days previous notice of the time and place of meeting, to make such appraisment to the owner or owners resident in this state; and the appraisers or a majority of them, shall make regular entries of their determination and appraisal in a book or books to be by them kept for that purpose, and shall certify the same under their hands and seals, acknowledging the same before some person authorized to take the acknowledgment of deeds, and shall cause such book or books to be filed in the office of the clerk of the county, in which the lands may be situated, there to remain a public record; and the company shall pay or tender the damages so assessed to the person or persons entitled thereto; or in case such owner or owners shall be *feme covert*, under age, *non*

compos mentis, or reside out of the State of New Jersey, the said company shall pay the same into the court of chancery of this state, to be disposed of under the order of the chancellor, according to the laws of this state; and immediately thereupon the estate, right, property and interest in and to the premises so appropriated, described and appraised, shall be vested in the company, to be by them held so long as they shall be used for the purposes of said canal.

7. And be it enacted, That it shall be lawful for the president and directors of said company, and their superintendents, engineers, workmen and laborers, with carts, wagons, and other carriages, and with their beasts of draught and burden, and all necessary materials, tools and implements to enter upon all lands, contiguous or near to the route or tract of the canal, doing as little damage thereto as possible, and repairing any breaches they may make in the enclosures thereof, and to take and carry away any stone, gravel, clay, sand or earth there, being most conveniently situated, and being most suitable for making or repairing said canal, the locks and other devices before mentioned thereto belonging; the said owners or occupants being entitled to a fair compensation or remuneration for the materials taken or damages done, if claimed within twelve months from the time of such damage sustained, or materials taken away; and in case of disagreement as to the amount of such damage, then it shall be lawful for the clerk of the common pleas of the county, upon the application of the company, to appoint three judicious disinterested freeholders as appraisers, who having given at least fifteen days notice to the owners, occupants, or persons having charge of such lands, and having been previously sworn, fairly and impartially, to inquire into, and report the amount of the said damages, shall deliver to each party, or deposit in the clerk's office of the county for their use, a copy of their appraisal under their hands and seals; which appraisal shall be conclusive evidence, of the amount of

damages in any suit to be brought therefor (deducting therefrom, on such suit, all costs and charges of the appraisement if the amount so appraised shall not exceed one dollar, nor be less than what the company offered to pay, before the appointment of appraisers.

8. And be it enacted, That the president and directors, or a majority of them, shall have power to elect all engineers, treasurers, collectors, cashiers, tollmen, clerks, agents, artificers, workmen, laborers, servants, and officers whatsoever, necessary in their judgment, for conducting the affairs of the company, and to dismiss and elect others at their pleasure, and also shall have power to charge and collect tolls, and rates for the passage of all boats, goods, draught, cattle, wares, passengers, produce and merchandise whatsoever, upon the canal, or upon its banks, and to make, enact, and at pleasure, to change and re-enact such tolls, and rates, and also regulations and rules, for the collection and levying of the same, as to them may seem proper; provided, the company shall at no time charge more than three cents per ton per mile on the passage of coal, lime, gypsum, iron, iron ore and stone, and a proportional charge upon other articles, contemplating their bulk, weight, and value, and a card thereof, to be put up in a conspicuous place, at every lock, or other point on said canal, where tolls shall be required to be paid; and if at any time hereafter, the said president and directors, shall deem it expedient to increase their capital stock for the canal aforesaid it shall be lawful for them so to do, and to obtain subscriptions for the same, and to manage and direct the same agreeably to the provisions, true intent and meaning of this act; and all stockholders of such additional shares, and their assigns, shall be thenceforward incorporated into the same company:—Provided always, that a preference of subscription shall always be given to actual stockholders, in proportion to the shares they shall respectively hold, and that such additional stock shall not exceed five hundred thousand dollars.

9. And be it enacted, That at the general meeting of the stockholders to be held annually, agreeably to the second section of this act, a general statement of the affairs of the company shall be made, and exhibited, by the president and directors, and the president and directors, or a majority of them, shall at that meeting, or as often as to them may appear expedient, declare such dividends of the net profits of the company as they may think proper.

10. And be it enacted, That the capital stock of said company, shall be deemed personal property, and that all shares of the capital stock, at any time, owned by any stockholders, shall be transferable on the books of the company, in such manner, as the by-laws shall ordain; but all debts due or payable to the company, and also all outstanding engagements with it, shall be satisfied previously out of said stock, before such transfer can be made, and before any dividend or dividends shall be paid upon such shares, unless by the consent of the president and directors.

11. And be it enacted, That under the powers and conditions stipulated in the foregoing enactments, it shall be lawful for the company to alter at any time, any part or parts of the route of the canal, making compensation for damages to owners, as herein before directed, and that it shall not be lawful for any person or persons, or any body politic, or corporate; whatsoever, to construct any canal within ten miles of any point of the main trunk of the Morris Canal, without the consent of the said company, expressed in writing, under their common seal; but this prohibition shall not extend to the construction of any canal, of less than ten miles in length, and which does not approach within two miles of the canal to be constructed under this charter, and saving to any person or persons, or body corporate, any of their just and legal rights, already vested, to the contrary of such prohibition; and it shall be the duty of the chancellor of this state,

upon application made therefor, by the solicitor of the company, in due form, to issue his injunction, to stay and prevent the construction of any such canal, and also it shall be lawful for the said company, to raise the waters in the Green Pond, and lake Hopatcong, commonly called the Great Pond, by damming the same, and to use the surplus waters, thus saved, and so much water of said ponds as shall be necessary for said canal, and to take and convey said waters, into said canal; all loss and damages, to the owners of said ponds, and the lands flowed, or otherwise, used in obtaining water for the same, as aforesaid, being paid for agreeably to the previous provisions of this act.

12. And be it enacted, That when the said canal shall cross any public road or farm, it shall be the duty of said company at their proper expense, to make good and sufficient bridges across said canal, and to keep the same in repair, so as to prevent any inconvenience in the usage of the said road, or farms, by reason of the said canal crossing the same.

13. And be it enacted, That if any person or persons shall in any manner, wilfully and maliciously, destroy, injure, or obstruct said canal, or any of its parts, or works therewith, connected, or unnecessarily and maliciously open any gates thereon, or otherwise let off and waste water, to the detriment of said company, he, she or they, shall be considered guilty of a misdemeanor and being thereof convicted shall be punished by fine or imprisonment, or both at the discretion of the court in which such conviction shall take place; Provided, such fine shall not exceed the sum of twenty five dollars, nor the imprisonment, the term of two years; and such criminal prosecution, shall in no wise impair the right of action, for damages, by a civil suit to be brought by the company.

14. And be it enacted, That for the encouragement of so great an undertaking, as the erection of said canal,

and in some measure to induce capitalists and others to subscribe for the same, it shall be lawful for the said company, to increase the capital stock of said company for the purpose of banking operations; but under the following conditions, limitations, and restrictions, namely, that as soon as the said company shall have actually paid, laid out and expended the sum of two hundred thousand dollars, in the purchase of lands, waters, and water privileges, necessary for the construction and uses of said canal, and in constructing, making and building the same, it shall and may be lawful for the president and directors aforesaid, to call from the stockholders respectively of said canal company, for the time being, in proportion to their respective shares, the sum of two hundred thousand dollars, or any less sum, in the discretion of said president and directors, towards a capital for banking purposes as aforesaid, and so often thereafter as the said company shall have paid, laid out and expended other like sum, of two hundred thousand dollars, in the purchase of lands as aforesaid, and in constructing, making and building the said canal as aforesaid, it shall be lawful for the president and directors aforesaid, to increase the capital stock of said company, for banking purposes, to such further amount, of two hundred thousand dollars; Provided that the said increased capital of the company for banking purposes shall not exceed in the whole, one million of dollars; and the president and directors, shall and may upon any increase of the capital of said company, for banking purposes as aforesaid, call for the same, from the stockholders respectively, at such time and in such instalments in proportion to their respective shares, and upon such notice, and under such forfeitures, as they shall prescribe; Provided always, that no such increase of stock for banking purposes as aforesaid shall at any time be made, by reason of an alleged exependiture of any of the respective sums, of two hundred thousand dollars, as aforesaid, until the president and directors aforesaid, shall have first caused to be exhibited to the governor or person administering the

government of this state, a just and full statement, and account, showing that such expenditure of two hundred thousand dollars, had actually been made in and about the purchases, necessary for the construction of, and in the various works as aforesaid, of said canal, and the president and cashier, or person keeping the accounts of said company, shall severally certify the said account of expenditures, to be just and true, and subscribe their names thereto; and moreover make, subscribe and annex to the same their respective oath or affirmation, taken before one of the justices of the supreme court of this state, that the said account is just and true to the best of their knowledge and belief; and shall otherwise, if required, by the said governor, or person administering the government, prove to his satisfaction that the same is true, and further obtain from said governor, or person administering the government, a certificate under his hand, and the seal of the state, certifying that it hath appeared to him that the said sum of two hundred thousand dollars, has been actually expended upon, and towards the said canal, according to the provisions of this act, and that the said company is entitled to increase its capital stock, for banking purposes to that amount; which certificate the said governor or person administering the government, upon his being satisfied of the truth, and fairness of said account, is hereby authorized and required to grant; and the said president and directors, before any increase of their said capital for banking purposes to such additional amount of two hundred thousand dollars as aforesaid, shall cause the account and statement exhibited and sworn to as aforesaid, to be filed in the office of the secretary of state; and the certificate of the governor, or person administering the government as aforesaid, to be recorded in the same office; a certified copy of which certificate and account, by the secretary of state, under the great seal of the state shall be received in all courts in this state as evidence that such expenditures of two hundred thousand dollars was made on, or towards the said canal, at the exhibition of the account as aforesaid.

15. And be it enacted, That if the person acting as president and the person acting as cashier or accountant of the said company, and who shall have made or exhibited any such account as aforesaid, or either of them, shall wilfully and knowingly make a false oath to the same, such person shall be deemed guilty of perjury and on conviction of the same shall be subject to the pains and penalties of wilful and corrupt perjury.

16. And be it enacted, That within one year after the first increase of the capital stock of the said company, for banking purposes as aforesaid, shall have been made, and so annually thereafter, until the said canal shall be completed, the said company shall cause to be made out a just and true account of their expenditures upon said canal, within each of the said years respectively, which account shall be certified and sworn to by the acting president and cashier or accountant in manner as directed in the fourteenth section of this act; and the said account shall be filed within such year in the secretary's office of this state; and whensoever it shall appear by such annual account in any year, that the said company have not actually expended on said canal, at least the sum of one hundred thousand dollars within such year, or if the said company shall neglect to file said account in manner aforesaid, in any year, then, and in either case, the said company shall wholly cease from and discontinue all banking discounts and operations upon their said increased capital for banking purposes, and shall not resume the same until the said account shall have been proved and filed as aforesaid, and showing such annual expenditure.

17. And be it enacted, That if the said acting president and cashier, or accountant, or either of them, shall wilfully make a false oath to any such account as is mentioned in the foregoing section, such person shall be deemed guilty of perjury, and on conviction of the same,

be subject to the pains and penalties of wilful and corrupt perjury.

18. And be it enacted, That the banking house of the said company shall be situated, and their banking operations be conducted in the city of Jersey, in the county of Bergen, and it shall be the duty of the president and cashier of the said corporation for the time being, once in two years, to make a full return to the secretary of state, under oath, of the stock of said company used in banking operations, where the same is employed, how much specie is in the vault or vaults, of their banking house, or banking houses, what amount of notes of said company are in circulation, and the amount of debts due from and owing to said company; and in case the said president and cashier shall neglect or refuse so to do, for the space of ninety days, the legislature may at any time thereafter in their discretion, suspend said banking operations.

19. And be it enacted, That the funds of the said company shall never be employed in any other operations, nor for any other purposes than those provided for in this act.

20. And be it enacted, That nothing in this act shall be taken to impair the right of any person to an action against the said company for damages to his or her water rights, lands, tenements or hereditaments by the erection of said canal where such person hath not been agreed with by the said company, or his or her damages, right and estate satisfied and vested in the said company, under the previous provisions of the act.

21. And be it enacted, That in eleven years after the passing of this act and annually thereafter, the president and directors of said company shall be, and they are hereby required to pay or cause to be paid into the

treasury of this state, the one half of one per cent. on the whole amount of such capital actually subscribed and paid in, and which shall thereafter be paid into such company for banking purposes as aforesaid; and upon neglect to refusal so to do by said president and directors, the said tax shall and may be recovered in such manner as is directed in an act entitled "An act to tax bank stock," passed November second, one thousand eight hundred and ten, or any other act or acts of the Legislature for the time being, for the recovery of tax, on bank stock; and the said tax when collected shall be appropriate as other bank tax is or shall by law be directed to be appropriated.

22. And be it enacted, That so much of this act as relates to banking rights and privileges upon the increased capital of the company for banking purposes as aforesaid, shall continue and be in force for and during the term of thirty one years from the passage of this act.

23. And be it enacted, That unless one million of dollars shall be subscribed as aforesaid, on or before the first day of November next, and also unless the said canal shall be completed and opened for the passage of boats within fifteen years from the passage of this act, then the same shall be, and is hereby declared to be null and void.

24. And be it enacted, That the said company shall and may be, and are hereby made capable of using any part of their capital which shall be paid in for banking purposes as aforesaid, for the following additional purposes, that is to say, in buying and selling bills of exchange, or the stock of any body or bodies corporate and politic, and in loans upon bonds and mortgages; and they may bind themselves by contract not under seal, and receive and take by deed or devise any effects and prop-

erty, both real and personal, which may be left or conveyed to said company, in trust, and to assume, perform and execute any trust which has been or may be created by any deed bequest or devise as aforesaid; and the said company is hereby authorized and empowered to receive, take, possess, and stand seized of, and to execute any and all such trust or trusts in their corporate capacity and name, in the same manner and to the same extent as any private trustee, or trustees, might or could lawfully do, and no further; but it is hereby expressly declared, that the privileges hereby granted to the said company, for receiving, and executing trusts, are solely for the purpose of the protection of property so conveyed to them, and not for the purpose of aiding, or promoting any traffic in any kind of stocks, or in any kind of goods, wares or merchandizes; and in case any kind of goods, wares or merchandizes, shall be so conveyed, or bequeathed, in trust as aforesaid, the said company shall dispose of the same, as soon as it conveniently can be done, and the avails thereof shall be invested in stocks, or in bonds and mortgages, or other permanent securities for the sole use of the person or persons beneficially interested therein; and the said privileges shall not be so construed, as legally to empower the said company to take any other kind of trusts than such as are usual with other trustees: Provided always, that this act shall not extend to create any entailment, trust, or perpetuity, contrary to any existing provision of law.

25. And be it enacted, That the said canal when completed, shall for ever thereafter be esteemed a public highway, free for the transportation of any goods, comcodities or produce whatsoever, on payment of the tolls, and conforming to the regulations made or authorized by this act and it shall be lawful for the legislature of this state, at any time hereafter, to appoint three commissioners for the purpose of fixing and regulating the tolls to be taken on said canal; which shall be done by the said

commissioners in conjunction with two commissioners to be appointed by the company, unless the said company should refuse or neglect upon due notice to appoint any commissioners on their part, in which case the said commissioners on the part of the state or a majority of them, shall fix and regulate the tolls with due regard to the interests of the company and of the citizens of this state: Provided always, that they shall not have power to reduce said tolls lower than one half the greatest amount allowed by the ninth section of this act, without the consent of the president and directors of the said company.

26. And be it enacted, That at the end of ninety nine years from the passing of this act, it shall and may be lawful for this state, to take to itself, and on its own account the said canal and its appurtenances, paying to the said company the fair value thereof, to be estimated and fixed upon by ten commissioners or a majority of them, to be mutually chosen by this state and the said company; or in case that shall not be done at that time, or within one year thereafter, this charter shall continue so far as respects its canal operations, and privileges for the further term of fifty years, when it shall cease, and the said canal with its appurtenances become the sole property of this state.

27. And be it enacted, That the first, fifth, sixth and eleventh, sections and every other part of this act shall be so construed as that the said corporation shall not be authorized to take or appropriate to the use of said canal or under color or pretence that the same are necessary therefor, any lands, waters or streams of water, but such only as are actually necessary for the erection and use of said canal for the purpose of navigation only and its necessary towing paths and works as specified in the fifth section of this act; and that the said corporation shall not be authorized to demise, grant, alien or sell any such lands waters or streams of water, taken or

pretended to be taken or acquired for the use of said canal as aforesaid, or any part thereof, to any person or persons whomsoever (excepting only such lands as may be received by them by donation or acquired by them by private contract), and that the said corporation or any other person shall not be authorized to use or appropriate any part of said waters for mills or any other purpose than the mere navigation of said canal; and all waters not used for that purpose shall be permitted without unnecessary interruption to flow into their ancient and natural courses and channels; and that the twentieth section of this act shall be so construed, as to extend to damages sustained not only by the erection of the said canal in the first instance, but also by the subsequent operations of the said company from time to time, as the same may arise anything in this act before contained to the contrary notwithstanding.

28. And be it enacted, That this shall be a public act, and shall be judicially referred to by all judges, justices and others without being specially pleaded.

C. Passed December 31, 1824.

Chapter 212, Laws of 1922.

An Act to authorize the acquisition by the State of the Morris canal (as defined in this act), in whole or in part, and all the stock of the Morris Canal and Banking Company and the rights of all stockholders in said company and in said canal property and water rights, and all or any part of the right, title and interest of the Lehigh Valley Railroad Company in said canal property and water rights by virtue of its lease of said canal from the Morris Canal and Banking Company, or otherwise; to provide for a commission authorized to negotiate and agree upon terms of settlement with the Morris Canal and Banking

Company and the Lehigh Valley Railroad Company, in relation to the said canal property and water rights, and to vest in said commission certain powers necessary for carrying out the terms of settlement and to make such other provisions as may be necessary to effectuate the objects aforesaid.

WHEREAS, For the purpose of encouraging and promoting the construction of a public canal from the Delaware river to the Passaic river, the State, by act of December thirty-first, one thousand eight hundred and twenty-four, chartered the Morris Canal and Banking Company, and granted to said company certain franchises and priveleges mentioned therein, by virtue of which the said canal was constructed and completed to the Passaic river about the year one thousand eight hundred and thirty-one; and

WHEREAS, By subsequent legislative authority said canal was extended to the Hudson river about the year one thousand eight hundred and thirty-six; and

WHEREAS, By act of March fourteenth, one thousand eight hundred and seventy-one, the State authorized the making of a lease of the canal, its works, property and appurtenances, and the same were accordingly, on May fourth, one thousand eight hundred and seventy-one, leased to the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, which company has since that time been in the possession of the canal; and

WHEREAS, It is desirable, among other things, that the State of New Jersey should acquire the said canal property and rights, in whole or in part; and

WHEREAS, The acquisition of the said property of the Morris Canal and Banking Company, in whole or in part, and the right, title and interest therein of the Lehigh Valley Railroad Company, and the other

property described in the provisions of this act, are deemed necessary for the public uses of the State and to effect the objects and purposes of this act;

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The term "Morris Canal" as herein used means and includes all of the property, lands, rights, easements, privileges and franchises of whatsoever character now vested in the Morris Canal and Banking Company as well as that which has passed to or has been directly or indirectly acquired by the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, as lessee under and by virtue of a certain indenture of lease bearing date the fourth day of May, one thousand eight hundred and seventy-one, between the Morris Canal and Banking Company and said Lehigh Valley Railroad Company under and by virtue of the authority of an act of the Legislature entitled "A further supplement to the charter of the Morris Canal and Banking Company," approved March fourteenth, one thousand eight hundred and seventy-one, including two tracts of land and land under water in Jersey City fronting on the Hudson river, known as the "Little Basin" and the "Big Basin," respectively, and including any water rights and rights of diversion now or formerly vested in said Lehigh Valley Railroad Company or said Morris Canal and Banking Company, excepting any such rights that may have been acquired by any municipality of this State.

2. William H. Spear, of Jersey City, Hudson county, Frank H. Sommer, of Newark, Essex county, and Louis A. Focht, of Trenton, Mercer county, citizens of this State, are hereby appointed as commissioners to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, in relation to the matters hereinafter men-

tioned, who shall possess and have authority to execute the powers hereinafter provided. The said commissioners, before entering upon the discharge of their duties shall subscribe an oath, which shall be filed in the office of the Secretary of State, of New Jersey, that they will truly, faithfully and impartially, to the best of their ability, discharge the duties devolved upon them by this act. Said commissioners shall have power to hold hearings and to make investigations, either within or without the State of New Jersey, for the purpose of ascertaining the facts necessary to enter upon the negotiations, and to arrive at just terms of agreement and settlement, as provided in this act. Said commissioners shall be entitled, as compensation for their services, to the sum of five thousand dollars, each, to be paid at the rate of five hundred dollars per month until they have filed their report as hereinafter mentioned, whereupon they shall become immediately entitled to any balance of said sum of five thousand dollars not theretofore paid to them. They are authorized to expend a sum not exceeding ten thousand dollars for such assistance as they may require. The State Treasurer of the State of New Jersey shall honor all of the warrants of the commissioners for such compensation and expenses out of any funds in the State treasury otherwise unappropriated. In the event of the death, refusal, resignation or other inability of any of the persons named herein as commissioners to serve as such, the Governor shall appoint some one in the place and stead of such person.

3. Said commissioners are authorized, in behalf of the State of New Jersey, to make such terms of settlement and agreement between the State and the Morris Canal and Banking Company and the Lehigh Valley Railroad Company as they may deem advisable to secure the transfer of said Morris Canal as hereinbefore defined, in whole or in part, to the State of New Jersey, subject to the limitations hereinafter provided. Such settlement and agreement may include the grant by the State of any

of said canal property, or the State's rights therein to the Lehigh Valley Railroad Company, in consideration of the release by said company of its rights in the remainder of said Morris canal property, or upon other consideration in whole or in part; provided, that said commission shall not be authorized to make any settlement obligating the payment of any sum of money by the State to the Lehigh Valley Railroad Company or said Morris Canal and Banking Company or any other person.

Said commissioners shall make and file their report under this act on or before December first, nineteen hundred and twenty-two.

4. If said commissioners shall be unable to effect a settlement with the said canal company and the said railroad company, they shall report said fact to the next Legislature, together with any recommendations for further legislative action which they may deem advisable. If the commissioners shall make a settlement with the said canal company and said railroad company, they shall forthwith file with the Board of Conservation and Development of this State a report containing the terms of such settlement.

5. If the commissioners shall file a report fixing terms of settlement and agreement with said railroad company and said canal company, then said commissioners shall proceed to carry out the terms of said settlement and agreement. Said commissioners are authorized and directed in that event to cause to be executed on behalf of the State proper instruments in writing, approved as to form by the Attorney-General, signed by the Governor, and with the seal of the State thereto affixed, duly attested, conveying to the said railroad company or said canal company any and all right, title and interest of the State in said canal property agreed to be conveyed by said report of settlement and agreement, and to deliver such instruments to said company or companies, upon receiving from them appropriate instruments in writing,

approved as to form by the Attorney-General, to carry out on their part the terms of settlement as provided for in said report, and upon said companies performing any other things on their part to be performed.

6. The control and management of all the property, real and personal, conveyed and transferred to the State by the Lehigh Valley Railroad Company or the Morris Canal and Banking Company, or otherwise acquired, pursuant to the terms of this act, shall be vested in the said Board of Conservation and Development, subject to further action by the Legislature. If in order to carry out the terms of settlement and agreement made by the commissioners, it becomes necessary to condemn any of the shares of stock of the Morris Canal and Banking Company not owned by the Lehigh Valley Railroad Company, the proceedings for such condemnation shall be conducted by the Attorney-General at the request of the Board of Conservation and Development. Such proceedings shall be had under the provisions of the act entitled "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (Revision of 1900), and any supplement or amendments of said act so far as applicable and so far as consistent with the provisions of this act; *provided, however,* that the estate, right, title and interest of the Morris Canal and Banking Company and Lehigh Valley Railroad Company, General Securities Company, or their successors or assigns, in and to the waters of Lake Hopatcong and the lands under the same, together with the lock and dam at the outlet of the lake, with the lands necessary for their maintenance, operation and control, shall be vested in the State, and shall be maintained as and for an aquatic public park for boating, bathing, fishing and winter sports, and the lake level shall be maintained for said purpose at the normal high water mark as now established, natural elements permitting.

7. This act shall take effect immediately.

Approved March 11, 1922.

Agreement Made With the Lehigh Valley Railroad Company.

AGREEMENT made this twenty-ninth day of November, 1922, between Frank H. Sommer, Louis Focht and Edward L. Young, Commissioners acting on behalf of the State of New Jersey, under and by virtue of the authority of an Act of the Legislature of the State of New Jersey known as Chapter 212 of the Laws of 1922 of said State (p. 367), party of the first part, and Morris Canal & Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, parties of the second part.

The parties hereto, in pursuance of and in accordance with the authority conferred by said Act, agree as follows:

First: On behalf of the State of New Jersey the said Commissioners agree as follows:

(1) To cause to be executed and delivered a proper instrument in writing conveying to the Lehigh Valley Railroad Company all the right, title and interest, present and reversionary, of the State of New Jersey of, in and to all of the lands, lands under water and premises located in Jersey City, Hudson County, New Jersey, referred to in said Chapter 212 of the Laws of 1922 as the "Big Basin" and more particularly described in Chapter CXXXIII of the Laws of 1867 of the State of New Jersey (p. 251) excepting therefrom, however, a strip of land under water for a public waterway as hereinafter provided for in Paragraph 4 of the undertakings of the parties of the second part.

(2) To cause to be conveyed by proper instruments in writing all the right, title and interest, present and reversionary, of the State of New Jersey of, in and to all lands, lands under water and rights of way of the Canal Company

in Jersey City and Bayonne between the center line of Washington Street in Jersey City and the Hackensack River at the point where said canal enters said river, but the said cities of Jersey City and Bayonne shall have the right to maintain and replace sewers, water pipes and other sub-surface structures now on said premises, subject, however, to the terms of any existing agreement or agreements relating to the same, and said cities shall have the further right to construct additional sewers, water pipes and other sub-surface structures across and under said premises at their own expense respectively, but free from any liabiilty to pay compensation or damages; provided, however, that said cities respectively in such case shall enter into a proper instrument in writing with the Lehigh Valley Railroad Company agreeing to indemnify said company against the results of any defective or improper construction or negligent use of any such sewer, water pipe or other sub-surface structure.

(3) To cause to be conveyed, by proper instruments in writing all the right, title and interest, present and reversionary, of the State of New Jersey of, in and to all lands, lands under water and rights of way of the Canal Company in the Town of Phillipsburg from the southerly line or side of Main Street adjacent to Green's Bridge over the Morris Canal to the point where the Morris Canal enters the Delaware River, but the Town of Phillipsburg shall have the right to maintain and replace sewers, water pipes and other sub-surface structures now on said premises, subject, however, to the terms of any existing agreement or agreements relating to the same, and said Town shall have the further right to construct additional sewers, water pipes and other sub-surface structures under said premises at its own expense but free from any liability to pay compensation or damages; provided, however, that said Town in such case shall enter into a proper instrument in writing with the Lehigh Valley Railroad Company agreeing to indemnify the said Company against the re-

sults of any defective or improper construction or negligent use of any such sewer, water pipe or other subsurface structure.

(4) To consent, and they do hereby consent, that the Provident Life & Trust Company of Philadelphia, Trustee, release the properties hereinbefore referred to from the lien of the mortgage of the Morris Canal & Banking Company securing the issue of bonds in the amount of $500,000 hereinafter referred to.

(5) To institute and prosecute to completion, when requested in writing by the Lehigh Valley Railroad Company, proceedings for the condemnation of any stock, consolidated or preferred, of the Morris Canal & Banking Company, the cost and expense of such proceedings, including the payment of the award for such stock, to be borne by said Railroad Company. Notice of the institution of any such condemnation proceeding shall be given to said Railroad Company and said Company shall be permitted to participate through its attorneys in the conduct thereof.

Second. Said Companies agree as follows:

(1) The Lehigh Valley Railroad Company will pay to the State of New Jersey in cash the sum of eight hundred and seventy-five thousand dollars ($875,000.00) in five equal annual installments, the first installment to be paid on the fifteenth day of December, 1922; subsequent installments to be paid on the fifteenth day of December in each year thereafter until said principal sum is fully paid. Interest shall be paid annually on the fifteenth day of December in each year subsequent to December 15, 1922, at the rate of five per cent. (5%) per annum upon such part of the principal sum as remains unpaid.

(2) The Companies will convey or cause to be conveyed in fee, except as hereinafter noted, to the State of New Jersey by deed of bargain and sale, with covenant by the

Lehigh Valley Railroad Company against its own acts and the acts of the Morris Canal & Banking Company, all the lands, lands under water and premises comprised within the Canal Terminal Basin in Jersey City, commonly called the "Little Basin," with the docks, wharves, slips and improvements appurtenant thereto, owned by said Companies or either of them, described as follows:

Beginning at a point in the center line of Essex Street extended distant 185 feet easterly at right angles from the center line of Hudson Street, running thence (1) easterly along the center line of Essex Street extended 790.03 feet more or less to the exterior line for piers in the Hudson River as now established; thence (2) southerly along said exterior line for piers 591.63 feet more or less to a point in the northerly line of the tract of land hereinbefore referred to as the "Big Basin"; thence (3) westerly along said line a distance of 1866.3 feet more or less to the center line of Washington Street; thence (4) northerly along the center line of Washington Street 360 feet; thence (5) easterly on a line parallel with Essex Street and distant 230 feet southerly from the center line thereof a distance of 650 feet to a point; thence (6) northerly at right angles to Essex Street 100 feet; thence (7) easterly parallel with Essex Street and Essex Street extended 471 feet more or less to a point 185 feet easterly at right angles from the center line of Hudson Street; thence (8) northerly at right angles to Essex Street extended 130 feet to the center line of Essex Street extended, the point of beginning; containing approximately 20.7 acres; together with the right, title and interest of the said parties of the second part in and to any lands, lands under water and easements lying in the Hudson River in front of the said premises; subject, however, to any public streets or highways; provided, however, that as to such part of said tract included within the lines of Essex Street extended the Companies convey their right, title and interest. Nothing herein, however, shall operate as a dedi-

cation or the recognition of the dedication of any street, highway or public place.

(3) The Lehigh Valley Railroad Company will extend the present branch of its railroad now running to Warren Street, Jersey City, from said Warren Street to said "Little Basin" along the present right of way of the canal, when requested to do so by the Board or authority having control or management of said "Little Basin," and subject to necessary State and Municipal consent.

The Lehigh Valley Railroad Company agrees that in traffic service to be accorded by the said Company with respect to the "Little Basin," the Jersey City and New York rates shall apply, with switching charges to be absorbed in the through rates to and from all connecting lines in Hudson County under tariffs to be approved by the Interstate Commerce Commission.

(4) The Companies will convey to the State of New Jersey by like deed with like covenant, for the purposes of a public waterway, all their right, title and interest in and to a strip of land and land under water located in Jersey City and partly within the limits of the "Big Basin" and bounded and described as follows:

Beginning at a point in the center of Washington Street, said point being 260 feet south of the southerly boundary of the "Little Basin"; thence northerly along the center line of Washington Street, 50 feet to a point 210 feet south of the southerly boundary of the "Little Basin"; thence eastwardly, parallel with and distant southerly 210 feet from the southerly boundary of said "Little Basin", 1845.5 feet more or less to the pierhead line on the Hudson River as now established; thence southerly along said pierhead line, 251 feet, more or less, to a point; thence westerly along the northerly line of the existing piers of the Lehigh Valley Railroad Company 2261 feet, more or less, to a point in the easterly line of

Warren Street, extended; thence northerly, along the said easterly line of Warren Street, extended, 200 feet to a point; thence eastwardly along a line parallel with and 260 feet south of the southerly boundary of the said "Little Basin", extended, 440 feet to the place of beginning, containing 12.541 acres more or less.

Until the present 200-foot public waterway running west from Washington Street to Warren Street shall be widened to a width of 250 feet by public authority, the Lehigh Valley Railroad Company shall have the right without cost to use the waters of the northerly 50 feet of the 250-foot public waterway hereinbefore described for the purpose of mooring boats.

Nothing herein contained shall be construed to create any obligation on the part of the State of New Jersey to incur any expense in dredging or otherwise maintaining the said waterways.

(5) The Companies will convey, or cause to be conveyed, to the State of New Jersey by like deed with like covenant all lands and right of way of the Canal Company between the westerly shore or bank of the Hackensack River in the Town of Kearny and the southerly line or side of Main Street adjacent to Green's Bridge in the Town of Phillipsburg aforesaid, and further, all the right, title and interest of said Companies or either of them or of any subsidiary company of, in and to all that part of the canal property and its feeders between the said westerly shore or bank of the Hackensack River in the Town of Kearny and the southerly line or side of Main Street adjacent to Green's Bridge in the Town of Phillipsburg, together with all the lands which said Companies last mentioned own which are appurtenant to or used in connection with the aforesaid part of the canal and its feeders, and also all lands, land under water, water and water rights, rights of flowage, pondage and diversion of water appurtenant to the canal, together with all rights

of the Canal Company and of its lessee, the Lehigh Valley Railroad Company, or of any one claiming under them or either of them, appurtenant to, or used in connection with the canal, to take, use, impound, divert, sell and dispose of water. The deed to be given to the State to embrace the surrender to the State by the Morris Canal and Banking Company and the Lehigh Valley Railroad Company of all the right and title acquired by or vested in said Companies or either of them to impound, divert or take water at any point within the State for any use or purpose in any way incident or pertaining to the canal or to the operation of the canal, its feeders, works or appurtenances.

The aforesaid conveyance shall be subject to the terms of the release given by the Morris Canal & Banking Company and its said lessee to the Mayor and Aldermen of Jersey City, dated May 12, 1909, and subject to the right of said Mayor and Aldermen of Jersey City continuously to maintain its drains, pipes and conduits down and along the inclined plane at Boonton and to conduct the same along the canal at a point below the first lock east of said plane so as to protect the water supply of said City from pollution; and also subject to the provisions of two certain contracts, namely, one made between the Lehigh Valley Railroad Company, the East Jersey Water Company, the Newark Aqueduct Board and the Mayor and Common Council of the City of Newark, dated September 24, 1889, relating to a supply of water for the City of Newark, and the second between the Morris Canal & Banking Company, the Lehigh Valley Railroad Company, and Patrick H. Flynn, dated November 21, 1898, relating to a supply of water for the City of Jersey City.

(6) The said Companies will assign, transfer and set over to the State of New Jersey all personal and mixed property of the said Companies used in connection with said canal.

(7) The Lehigh Valley Railroad Company will, at its own expense, maintain the said Morris Canal as a canal in the usual manner until the first day of March, 1923.

(8) The Lehigh Valley Railroad Company will assign, transfer and set over to the State of New Jersey, or its nominees, on or before December 30, 1922:

(*a*) All of the shares of the capital stock of the Morris Canal & Banking Company owned by said Lehigh Valley Railroad Company, being 9,921 shares of consolidated stock and 11,399 shares of preferred stock.

(*b*) All of the outstanding bonds of the Morris Canal & Banking Company, which said bonds are owned by said Lehigh Valley Railroad Company and have an aggregate par value of $500,000.

(*c*) All of the outstanding preferred scrip of the Morris Canal & Banking Company, which said scrip is owned by the said Lehigh Valley Railroad Company and has an aggregate par value of $42,080.50.

(9) The Lehigh Valley Railroad Company will acquire and assign, transfer and set over to the State of New Jersey all of the remaining outstanding stock, consolidated and preferred, of the Morris Canal & Banking Company not now owned by said Lehigh Valley Railroad Company. If the said Lehigh Valley Railroad Company cannot, on or before March 1, 1923, purchase such remaining outstanding stock at a price satisfactory to it and it therefore becomes necessary to condemn said shares of capital stock in order to acquire the same, said company shall request the Board of Conservation and Development of the State of New Jersey to bring proceedings in the name of the State to condemn said stock, and said proceedings shall be taken in accordance with subdivision 5 of the first section of this agreement and in

conformity with the provision of Chapter 212 of the Laws of 1922 aforesaid.

Pending the acquisition, by purchase or condemnation, and the transfer of said remaining outstanding shares of consolidated and preferred stock of the Morris Canal & Banking Company, the said Lehigh Valley Railroad Company will continue to pay the dividends thereon in accordance with its existing guaranty.

The Lehigh Valley Railroad Company will further, upon request of the Board of Conservation and Development of the State of New Jersey, deliver the resignations of all officers and directors of the said Morris Canal & Banking Company.

(10) The said companies will assign, transfer and set over, or cause to be assigned, transferred and set over to the State of New Jersey by a proper instrument in writing all existing leases, licenses and undertakings covering any part of any of the property to be conveyed or transferred to the State of New Jersey, and will deliver, or cause to be delivered, to the State of New Jersey all documents, maps, records, deeds and muniments of title relating to any of the property to be conveyed or transferred to the State of New Jersey.

(11) The Lehigh Valley Railroad Company will execute and deliver to the State of New Jersey on or before March 1st, 1923, a proper instrument in writing releasing any and all claims of every nature and description which the said company has, or may have, against the Morris Canal & Banking Company.

(12) The said companies hereby withdraw any and all protests heretofore made respecting taxes heretofore paid by the said companies to the State of New Jersey or to any municipality of the State on the canal property.

This withdrawal, however, shall not extend to or affect pending appeals involving the assessments for taxes for the years 1921 and 1922 on the "Little Basin" property, and the Lehigh Valley Railroad Company hereby agrees with respect to such assessments for taxes for the years 1921 and 1922 on the "Little Basin" property to pay such taxes as may finally be determined on said appeals to be due. Said companies shall not, nor shall either of them, be responsible for any taxes assessed for the calendar year 1923 or for any period after January 1, 1923, on the property conveyed and transferred or to be conveyed and transferred to the State of New Jersey under the terms of this agreement.

(13) The said Companies agree that any rents collected by them, or either of them, under existing leases, undertakings or licenses, covering or relating to any of the property to be conveyed or transferred to the State of New Jersey under the terms of this agreement for any period extending beyond January 1, 1923, shall be apportioned as of that date; rents for any leasehold period prior to January 1, 1923, shall be collected by and be the property of the Lehigh Valley Railroad Company.

(14) The Lehigh Valley Railroad Company will, in each of the several deeds of conveyance and instruments of transfer to be delivered hereunder by said company to the State of New Jersey, covenant that the property and rights to be conveyed or transferred are free from encumbrances, except as the same may be encumbered by rights created by and existing under the leases, agreements and other writings enumerated in the schedule attached hereto and marked "Schedule A", and except the mortgage securing the payment of bonds in the amount of five hundred thousand dollars ($500,000) hereinbefore referred to, and except encumbrances otherwise specifically set forth in this agreement.

There shall be excepted from the said several covenants against encumbrances and from the several covenants against grantor's acts which said Lehigh Valley Railroad Company has herein undertaken to enter into, the rights created by and existing under the leases, agreements and writings enumerated in the said Schedule A and said mortgage securing an issue of bonds in the amount of five hundred thousand dollars ($500,000) and any other encumbrances specifically set forth in this agreement.

(15) It is the intent of this agreement to vest in the Lehigh Valley Railroad Company all present and reversionary rights of the State of New Jersey in the properties referred to in Section 1 hereof, and to vest in the State of New Jersey all other property and rights of every description acquired by the Morris Canal & Banking Company and by the Lehigh Valley Railroad Company as its lessee, with the exceptions herein specifically provided.

(16) The Lehigh Valley Railroad Company covenants at its own expense to continue in possession and operate the canal and to maintain the same as hereinbefore provided under the existing lease until March 1, 1923, and the Morris Canal & Banking Company and the State of New Jersey covenant that the existing lease shall on that day be cancelled; the obligations of the Lehigh Valley Railroad Company for the payment of dividends on the outstanding stock to continue as hereinbefore provided.

(17) The Lehigh Valley Railroad Company hereby covenants that all debts of the Morris Canal & Banking Company have at the time of the execution hereof been paid and satisfied, except the liability for the payment of an issue of five hundred thousand dollars ($500,000) par value of bonds and an issue of scrip as hereinbefore referred to, and that no indebtedness shall be incurred by

said Morris Canal & Banking Company subsequent to the execution hereof and prior to the delivery to the State of New Jersey of the outstanding capital stock of said Morris Canal & Banking Company now owned by the Lehigh Valley Railroad Company, and the said Lehigh Valley Railroad Company further covenants to indemnify and save the Morris Canal & Banking Company and the State of New Jersey harmless from any claim or liability arising out of the operation of the canal property prior to March 1, 1923.

(18) The deeds of conveyance, instruments of assignment and tranasfer and other writings, to be executed and delivered by the parties hereto in performance hereof, shall be approved as to form by the Attorney-General of the State of New Jersey and shall be mutually delivered together with all documents, maps, records, deeds and other muniments of title at the office of the Board of Conservation and Development of the State of New Jersey in the City of Trenton on the first day of March, 1923, between the hours of 10 o'clock in the forenoon and 3 o'clock in the afternoon, except as any other time or times may hereinbefore have been specifically designated with respect to the delivery of any such conveyance, instruments of transfer and other writings.

(19) The Morris Canal and Banking Company covenants to execute and deliver to the Lehigh Valley Railroad Company a proper instrument of conveyance of all of its right, title and interest, free from any lien or encumbrance created subsequent to delivery to the State of New Jersey of stock of the Morris Canal & Banking Company, now owned by the Lehigh Valley Railroad Company, in the lands, lands under water and other canal property in respect of which the right, title and interest, present and reversionary, of the State of New Jersey is, under the terms of this agreement, to be conveyed to the Lehigh Valley Railroad Company.

In witness whereof, the parties hereto have duly executed this instrument in quintuplicate the day and year first aforesaid.

Frank H. Sommer,
Louis Focht,
F. L. Young,
Commissioners acting on behalf of the State of New Jersey.

[seal.] Morris Canal & Banking Company,
By E. E. Loomis,
President.

Attest:
D. G. Baird,
Secretary.

[seal.] Lehigh Valley Railroad Company,
By E. H. Boles,
Vice-President.

Attest:
D. G. Baird,
Secretary.

Schedule A.

This schedule, attached to the original contract, contains an itemized list of agreements relating to wires, pipes, leases ,easements and other miscellaneous privileges (1) affecting the canal property between Hackensack River and Green's Bridge, Phillipsburg, as of November 1, 1922; (2) affecting the Little Basin at Jersey City, N. J.; and (3) affecting waterway between Hackensack River and the south side of Main Street, adjacent to Green's Bridge, in the Town of Phillipsburg, in respect of covenants in deeds as to existing bridges, etc.

[Note:—Original contract filed December 1, 1922, in the office of the Secretary of State of the State of New Jersey, Trenton, N. J., and duplicate original filed December 1, 1922, in the office of the State Board of Conservation and Development, Trenton, N. J.]

Chapter 11, Laws of 1923.

An Act to vest in the Morris Canal and Banking Company, in trust for the State of New Jersey, all of the property and property rights, other than shares of the capital stock, bonds and scrip of said company, acquired or to be acquired by the State of New Jersey under and by virtue of the agreement entered into under the authority of an act entitled "An act to authorize the acquisition by the State of the Morris canal (as defined in this act), in whole or in part, and all the stock of the Morris Canal and Banking Company and the rights of all stockholders in said company and in said canal property and water rights, and all or any part of right, title and interest of the Lehigh Valley Railroad Company in said canal property and water rights by virtue of its lease of said canal from the Morris Canal and Banking Company, or otherwise; to provide for a commission authorized to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, in relation to the said canal property and water rights, and to vest in said Commission certain powers necessary for carrying out the terms of settlement and to make such other provisions as may be necessary to effectuate the objects aforesaid," approved March eleventh, one thousand nine hundred and twenty-two.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The title to all the property and property rights acquired or to be acquired by the State of New Jersey under and by virtue of the agreement entered into under the authority of the act entitled "An act to authorize the acquisition by the State of the Morris Canal (as defined

in this act), in whole or in part, and all the stock of the Morris Canal and Banking Company and the rights of all stockholders in said company and in said canal property and water rights, and all or any part of right, title and interest of the Lehigh Valley Railroad Company in said canal property and water rights by virtue of its lease of said canal from the Morris Canal and Banking Company, or otherwise; to provide for a commission authorized to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, in relation to the said canal property and water rights, and to vest in said Commission certain powers necessary for carrying out the terms of settlement and to make such other provisions as may be necessary to affectuate the objects aforesaid," approved March eleventh, one thousand, nine hundred and twenty-two, other than the shares of capital stock, bonds and scrip of the Morris Canal and Banking Company shall be, and the same is hereby vested in said Morris Canal and Banking Company in trust for the State of New Jersey.

2. All acts and parts of acts inconsistent herewith be and the same are hereby repealed.

3. This act shall take effect immediately.

Approved February 28, 1923.

Chapter 78, Laws of 1924.

An Act to enable cities, towns, townships, boroughs and certain counties to acquire portions of the property, the title to which is now vested in the Morris Canal and Banking Company in trust for the State of New Jersey, upon the abandonment of navigation upon the Morris canal, upon terms and compensation fixed by the Morris Canal and Banking Company and providing for the review of said terms and compensation by the Board of Public Utility Commissioners of the State of New Jersey.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Upon the abandonment by lawful authority of navigation upon the Morris canal, any city, town, township or borough within which any property is located, the title to which is now vested in the Morris Canal and Banking Company in trust for the State of New Jersey, and any county having control of a county road lying contiguous to any such property, shall have power and authority to acquire for public use, such parts of said canal property as may be located within its boundaries, in the case of any such municipality, or as may lie contiguous to any such county road, in the case of any such county, upon terms and compensation to be fixed by said Morris Canal and Banking Company after negotiation and approved by the Governor. Such terms and compensation may be reviewed by the Board of Public Utility Commissioners of the State of New Jersey, which is hereby directed and empowered to grant such review on the application either of such municapility or county or of the Morris Canal and Banking Company; and upon such review, the said board shall have power to determine the fairness of said terms and compensation, consideration being had of the condition of the canal property taken and its effect upon any such municipality or county and upon adjacent property

and also of the nature of the use to which it is intended to devote said portion of the canal property and the estimated cost of adapting it to such new use. The said board shall have power, if it shall find said terms or compensation unfair, to fix the terms and compensation deemed by said court to be fair, which terms and compensation shall be those upon which said portion of the canal property shall be transferred to such municipality or county unless such municipality or county shall within thirty days determine not to proceed with the acquisition thereof and shall pay the costs of said proceeding; *and provided, moreover,* that to avail itself of the provisions of this section, any such municipality or county shall on or before the first day of January, one thousand nine hundred and twenty-five, adopt a resolution expressing its desire to acquire such portion of the canal property and setting forth the purposes to which it is intended to devote said property when acquired.

2. Any property of the canal not acquired under the provisions of section one of this act, may be similarly acquired by any other of said municipalities, outside the boundaries of which such portion of the canal property may lie, if such portion is so situated as to form a single contiguous tract with the canal property lying within the municipality so seeking to acquire it and is capable of development for the purpose for which said municipality intends to acquire the canal property within its boundaries; *provided,* the municipality within which such canal property lies, shall have failed to take the necessary steps to acquire such property for its use.

3. Any municipality, county or counties which shall purchase any of such property may acquire by gift, purchase or condemnation any reversionary and any other private rights in the property so purchased and in all such cases of condemnation the valuation to be paid to the owner of such reversionary or other private rights shall be the value of such rights subject to the continued

use of the property for canal purposes together with the damage, if any, arising out of the change from the use for canal purposes to the public use for which the same shall have been taken by such municipality. If in any such case of condemnation it shall be determined that the rule of valuation in this act prescribed invades the constitutional right of compensation of any private owner, the measure of compensation shall be modified accordingly and the residue of this act shall not fail.

4. In the event of a public sale of any portion of such property, any city, town, township, borough, or county as specified in section one, is hereby authorized to bid for such property either on its own behalf alone or jointly with other municipalities, such sum as the governing body of such municipality may authorize. In the event of a joint bid such joinder shall be limited to property either situated within the municipality bidding or in the municipality adjoining the municipality bidding, or so situated as to permit by joint action of said municipality and any other municipality or municipalities joining with it the development of a section of said canal property as an unsevered unit. The amount of contribution of the respective municipalities to any such joint bid, and the character of the joint user of the property so bid for, shall be authorized by resolution of the respective governing bodies of the municipalities so joining approving the execution of a contract with the other municipalities joining, which contract shall embody the amount of the respective contributions to said joint fund, the interest of the respective municipalities in the property so bid for if acquired, and the joint user to which said properties if so acquired shall be dedicated and the respective appropriations of such municipalities to the cost of adapting said properties to such users. Such contract may upon the assent of all of the governing bodies of the municipalities, parties thereto, be modified from time to time.

5. This act shall take effect immediately.

Approved March 12, 1924.

Chapter 229, Laws of 1924.

An Act to authorize the abandonment of navigation upon the Morris canal and proviidng for the dismantling of the canal and the dispositions of portions of the property, the title to which is now held in trust for the State of New Jersey by the Morris Canal and Banking Company upon terms and compensation fixed by said Morris Canal and Banking Company and providing for the review of said terms and compensation by the Board of Public Utility Commissioners of the State of New Jersey, and further providing for the management and control of such property pending the disposition thereof.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Morris Canal and Banking Company is hereby authorized and directed to discontinue the use as a means of transportation by water of that portion of the property, the title to which is vested in the said company in trust for the State of New Jersey, which has heretofore been used as a means of transportation by water and which is located between the westerly shore or bank of the Hackensack river in the town of Kearny and the southerly line or side of Main street adjacent to Green's bridge in the town of Phillipsburg, which portion of said property is referred to in this act as the "Morris Canal" or as the "Canal"; and to discontinue the use as a means of transportation of water to the canal of those portions of such property which have heretofore been used as feeders to the canal; and for such purpose the said company is hereby authorized and directed to drain off the water from the canal and feeders, whenever aand wherever such action may be taken, in its judgment, without the creation of insanitary conditions or the impairment of

contract obligations. Such portions of such property shall be applied and are hereby dedicated, subject to the limitations hereinafter provided, to the public use as public highways for the transportation and passage thereon of persons and property and for any and all other purposes of public highways.

2. The rights vested in the Morris Canal and Banking Company to impound and divert waters of lakes, ponds, and streams, and the property and rights vested in the said company in Lake Hopatcong, Lake Musconetcong (otherwise known as Stanhope reservoir), Cranberry lake, Bear ponds, the pond on the Musconetcong river at Saxton falls, and Greenwood lake, together with all such lands, easements, rights and other property, the title to which is vested in the said company in trust for the State of New Jersey, as may be neecssary to maintain the said lakes and ponds, shall be retained by the said company in trust for the State of New Jersey, for the public use of conserving the public waters of the State and shall be and are hereby dedicated to such public use; and the said company is hereby authorized and directed to control, maintain and operate the dams and sluice gates at the said lakes and ponds for the purpose aforesaid and in such manner that the rights of the riparian owners upon said lakes and ponds and the outlets thereof shall be properly conserved.

3. The Morris Canal and Banking Company is hereby authorized to consent, under restrictions which shall not impair any existing rights, and for a consideration in each case to be fixed by its board of directors and approved in writing by the Governor of the State of New Jersey, to the diversion, for the purpose of municipal water supply, of the waters or any portion thereof, the title to the right to the use of which is vested in the said company in trust for the State of New Jersey; *provided*, that nothing in this section contained shall be construed

to dispense with any consent now or hereafter required to be obtained by any municipality, board or commission as a condition precedent to the diversion of the State's waters or to the development of a municipal water supply.

4. The Morris Canal and Banking Company is hereby authorized and directed to sell any and all of the property the title to which is vested in the company in trust for the State of New Jersey, other than the rights and property to be retained for public use as provided for in section two of this act. Wherever said property shall consist of lands so located as to be capable of use in the widening of any county road, the Morris Canal and Banking Company is authorized to transfer to the county wherein such section of the canal is located, such section thereof, upon the adoption by the board of chosen freeholders of said county of a resolution indicating the desire of said county to acquire said section for the purposes of a county road within the period hereinafter provided for the adoption of a similar resolution by municipalities; such transfer to be made upon such terms and for such consideration as shall be fixed after negotiation as hereinafter provided for in the case of municipalities and subject to the same right of review.

The Morris Canal and Banking Company is hereby authorized to transfer to the respective municipalities through which said canal passes the portions of the canal situated within their respective boundaries, exclusive of the rights and property to be retained for public use as provided in section two, upon the passage by the respective municipalities on or before the first day of January, one thousand nine hundred and twenty-five, of resolutions expressing the desire of such municipalities to acquire such portions of said canal and setting forth the purposes to which said municipalities intend to devote such property when so acquired. Upon the submission of any such resolution the Morris Canal and Banking Company is authorized to negotiate with said municipality the terms

upon which said property will be transferred to such municipality and in determining the compensation, if any, to be paid by said municipality for such property, said Morris Canal and Banking Company shall take into consideration the conditions of the canal in said municipality and the effect thereof upon said municipality and the adjoining property and also the nature of the use to which said property is to be devoted and the estimated cost of adapting the property to such new use. After the conclusion of such negotiations the Morris Canal and Banking Company shall, subject to the approval of the Governor, determine the terms upon which such transfer shall be made and the price, if any, which in its judgment, regard being had to the consideration above set forth, is a fair price for such municipality to pay; such determination, whether in the case of a municipality or of a county, as hereinabove provided, shall be subject to review by the Board of Public Utility Commissioners of the State of New Jersey, which is hereby directed and empowered to grant such review on the application either of such municipality or county or of the Morris Canal and Banking Company; and upon such review, the said board shall have power to determine the fairness of the terms and compensation determined upon by said Morris Canal and Banking Company and in the event that said board finds said terms or compensation unfair, to fix the terms and compensation deemed by said board to be fair. The terms and compensation so fixed shall be the terms and compensation for which said property shall be transferred to such municipality unless such municipality shall, within thirty days thereafter, determine not to proceed with the acquisition of said property and shall pay the costs of said proceeding. Upon the purchase as hereinabove provided by any municipality, county or counties of any such property for any such public use or uses, the property so purchased shall be applied to such public use or uses, or some of them, and such public use or uses shall supersede any other or different public use to which such property may have been theretofore dedicated.

5. If any such municipality shall fail to accept the terms and compensation for any such property fixed by the Morris Canal and Banking Company or upon review of its decision by the Board of Public Utility Commissioners as above provided for, or if prior to said first day of January, one thousand nine hundred and twenty-five, any such municipality shall fail to have adopted the resolution in section four provided for, or if prior to said first day of January, one thousand nine hundred and twenty-five, any such municipality shall have adopted a resolution declaring that it does not desire to acquire the property of said canal company located within its limits, then and in either of such events the said Morris Canal and Banking Company may transfer said property in the manner hereinafter provided.

In the first place it shall offer, subject to the same review as provided in section four, to any municipality which shall have taken appropriate steps to acquire the canal property lying within its boundaries, such portions of the canal lying in any other municipality or municipalities which shall have failed to take the necessary steps to acquire such property, as shall form a single, contiguous tract capable of development for the purpose for which said first mentioned municipality shall have acquired its tract.

In the second place, if, after a reasonable time, any municipality to which any such canal property lying without its limits shall have been offered, shall fail to have availed itself of said offer, then the Morris Canal and Banking Company, after advertisement, in such manner as may be determined by said board of directors, shall sell any unsold portions of the canal property to the highest bidder deemed by said board of directors to be responsible, at public or private sale; *provided, however,* that no such sale shall be made unless first approved, in writing, by the Governor of the State of New Jersey; *and provided, further,* that at such sale any municipality through which said canal may pass, either alone or jointly

with other municipalities through which said canal may pass, may bid for any parcel of said canal so offered for sale.

Upon any such sale, any previous dedication of the property so sold to any public use shall cease and be of no further force and effect, and the purchaser shall be entitled to take and hold such property free from any previous dedication to any public use. The said company is hereby authorized to sell, in such manner and for such price and upon such terms as the said board of directors may deem advisable, the structures and parts thereof and other materials to be removed on dismantling the canal as provided for in section seven of this act and other personal property no longer useful in connection with the canal.

6. Pending the sale of the property authorized or directed by the provisions of this act to be sold, such property shall continue to be managed and controlled by the Morris Canal and Banking Company. All the other property and rights the title to which is vested in the Morris Canal and Banking Company in trust for the State of New Jersey, shall also continue to be managed and controlled by the said company. The stock of the said company, the title to which is held in trust for the State of New Jersey, shall, at each election of directors, be voted upon in favor of the election, as directors of the said company, of the members of the Board of Conservation and Development as the same shall from time to time be constituted. The said company is hereby authorized to let part or parts of the property and property rights, the title to which is vested in the said company in trust for the State of New Jersey; *provided, however,* that any and all leasehold estates and interest so created shall be terminable upon thirty days' notice to the lessee of the desire of the said company or of the State of New Jersey to terminate the same.

7. The Morris Canal and Banking Company is hereby authorized and directed, as soon as the water shall have been drained off from the canal, to proceed promptly to remove such highway and road bridges as have heretofore been maintained by the said company at intersections of the canal with existing highways and roads and to refill the canal bed at these points and to grade down the approaches and to replace such bridges with roadways connecting with the adjoining highways or roads and graded and paved or surfaced to conform to the adjoining highways or roads respectively. The said company is hereby authorized and directed to repair and make safe the dams and sluice gates at the lakes and ponds mentioned in section two of this act and to raze and remove or put in a condition safe to life and limb all other structures heretofore maintained by the said company, and to make proper provision to prevent future obstruction of highways, roads or water courses through the decay and fall of culverts, aqueducts or other structures, and to provide for the proper drainage of the canal.

8. If the authorities having charge of any street, highway or road on which there is a bridge or crossing to be removed by the Morris Canal and Banking Company as provided in section six of this act, shall prefer to relocate or otherwise readjust such crossing in a manner or to an extent different from that provided in section six of this act, then and in any and every such case the said company is hereby authorized, instead and in lieu of constructing any such crossing as required in section six of this act, to contract with such authorities for the construction by such authorities of any such relocated or readjusted crossing and in such contract to agree with such authorities for the payment by the said company of such portion of the cost of such relocated or readjusted crossing as shall not exceed the estimated cost of the crossing instead and in lieu of which such relocated or readjusted crossing shall be so contracted for.

9. The Morris Canal and Banking Company is hereby authorized to procure and employ such legal and technical aid and to employ such administrative officers, clerical assistants and laborers as the said company may require for the purpose of enabling it to administer, in accordance with the terms of this act, the property, the title to which is vested in the said company in trust for the State of New Jersey, and the said company is hereby authorized to enter into such agreements with independent contractors as its board of directors may deem advisable in order to carry out the directions contained in this act; *provided, however,* that no such agreement involving the expenditure of more than one thousand dollars shall be entered into unless first approved in writing by the Governor of the State of New Jersey; *and provided, further,* that no such agreement shall be entered into in excess of existing appropriations available therefor and applicable thereto.

10. The board of directors of the Morris Canal and Banking Company are hereby authorized and directed, in behalf of the said company to do or cause to be done by the officers of the said company thereunto authorized by its board of directors, all acts and things and to execute or cause to be executed, all contracts, instruments of conveyance, consents, leases or other documents authorized or directed by the provisions of this act to be done or executed by the said company or which the said board of directors shall deem expedient to be done or executed for the purpose of carrying out any of the purposes of this act. All such contracts, instruments of conveyance, consents, leases or other documents shall be approved as to form by the Attorney-General before being executed by said company. Any instrument of conveyance executed by the Morris Canal and Banking Company pursuant to any of the provisions of this act shall operate to convey all the right, title and interest of the said company and of the State of New Jersey in and to the property therein described. The Board of Conservation and Development,

in whom is vested the title to the bonds issued by the said company, is hereby authorized and directed, upon any sale of any property as authorized by the terms of this act, to take such action and execute such documents as may be necessary or advisable to procure the release of such property from the lien of the mortgage securing the said bonds.

11. The Morris Canal and Banking Company, by its general manager or by any officer thereunto duly authorized by its board of directors, shall be entitled to and is hereby authorized to receive and receipt for the purchase price, rentals or other income of any property sold or let as authorized by any of the provisions of this act, and to receive and receipt for the consideration paid upon the granting of any consent, as authorized by any of the provisions of this act. All moneys so received by the said company shall be paid into the treasury of the State not later than the tenth of the month following that during which the said moneys were collected or received.

12. This act shall take effect immediately.

Approved March 13, 1924.

(2)

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 818.

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF, as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

Petitioners,

vs.

CITY OF NEWARK,

Respondent.

BRIEF OF RESPONDENT IN OBJECTION TO GRANTING A WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS.

RAYMOND SCHROEDER,
Attorney for Respondent,
City Hall,
Newark, N. J.

PHILIP J. SCHOTLAND,
Of Counsel,
Newark, N. J.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 818.

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF, as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

Petitioners,

vs.

CITY OF NEWARK,

Respondent.

RESPONDENT'S VERSION OF THE FACTUAL SITUATION INVOLVED.

This case arises from a claim by the petitioners that as heirs at law of their ancestor they are entitled to the reversion in certain lands located in the City of Newark, New Jersey. The lands in question were conveyed by the ancestor of the petitioners by deed dated January 9th, 1830, to the Morris Canal and Banking Company, their successors and assigns.

The habendum clause of the deed is as follows:

> "To have and to hold the said land and premises to the said The Morris Canal and Banking Company, their successors and assigns, so long as the same shall be used for the purpose for which the Morris Canal and Banking Company have power to use the same by the true intent and meaning of the said act" (R. 55 and 56).

The petitioners commenced their action in the Supreme Court of New Jersey, the case was duly tried, all the parties involved were before the Court and the Supreme Court, in construing the habendum clause in connection with the Laws of the State of New Jersey and the State Statutes involved, deemed that no reversionary rights had arisen in favor of the petitioners. (Opinion of Supreme Court of New Jersey R. 7, reported in 124 N. J. Law 312.)

The only issue was and is a question of title to real estate in New Jersey, which question was duly adjudicated by the Courts of the State of New Jersey. The only theory upon which the petitioners seek this Writ is in effect that because the Supreme Court of New Jersey decided and the Court of Errors and Appeals of New Jersey affirmed said decision, that the petitioners had no property rights, they are thereby deprived of their property without just compensation, evidently because they do not agree with the decision of the Court and still think they are entitled to the property.

Based upon this line of thinking and assumption on the part of petitioners, they have stated their grounds changing the verbiage but always claiming the same thing, that they are thereby the victims of a violation of the Constitution of the United States and of the Constitution of the State of New Jersey in being deprived of their property

without just compensation, without due processes of law, and that their constitutional rights are impaired and the natural right to have and acquire property is interfered with.

The legal situation as it appears to respondent, is dealt with in the following three points:

SUMMARY OF ARGUMENT.

POINT I.

The provisions of Title 28, Section 344 U. S. C. A. (Section 237 as amended) afford no authority for review by this Court of the proceedings had in the State Courts of New Jersey on a purely local matter.

POINT II.

The decision of the highest Court of a State involving nothing more than the ownership of property with all the parties in interest represented, cannot be regarded by the unsuccessful party, as a deprivation of any constitutional rights.

POINT III.

The record of the case before the Supreme Court and Court of Errors and Appeals of the State of New Jersey shows that the issue involved is a purely local matter, viz., the title to real estate located in the State of New Jersey, the determination of which rests purely on the laws of New Jersey, and no Federal Statute or Treaty or Federal question being involved, this Court does not take jurisdiction either by certiorari or appeal.

ARGUMENT.

POINT I.

The provisions of Title 28, Section 344 U. S. C. A. (Section 237 as amended) afford no authority for review by this Court of the proceedings had in the State Courts of New Jersey on a purely local matter.

Petitioners rely in their Brief upon U. S. C. A. 28, Section 344, as the basis for the assumption of jurisdiction by this Court, and the issuance of a Writ of Ceritorari.

We desire to call the Court's attention to the fact that by the provisions of this Section (a full copy of which is printed in Appendix A of this Brief) a Writ of Certiorari may be issued to review a final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, where there is drawn in question the validity of a Treaty or Statute of the United States and the decision is against its validity.

In the instant case there is no question involving either the validity of a Treaty or of a Statute of the United States. This Section also permits Certiorari where there is drawn in question the validity of a Statute of any State on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States.

In the instant case there is no Statute of the State of New Jersey drawn into question on either or any of those grounds.

The same grounds by Section 237 as amended of the Judicial Code, may be used as grounds for appeal to this

Court, but as pointed out above, none of them are involved in the instant case.

The additional grounds mentioned in Paragraph (b) of said Section 237 of the Judicial Code, which are:

> "* * * Where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States:"

is of no help to the petitioners because no such questions are involved in the instant case.

In the case of *Caperton* vs. *Ballard,* 14 Wall. 238, 241, 20 L. Ed. 885, this Court said, referring to the same Section, now 237 of the Judicial Code as amended:

> "This Court has repeatedly declared that it is only under the 25th Section of the Judiciary Act (now 237) that it takes cognizance of error committed in the highest Courts of the State. There must be a Federal question, within the terms of that Section, to enable us to review the decision of a State tribunal."

In *Grand Gulf Railroad and Banking Company, et al.* vs. *John R. Marshall,* 12 Howard 165, this Court held that where it appears from the record that the decision of the State Court turned upon the construction and not the validity of a State Law, and that the question of its validity was not raised, this Court has no jurisdiction.

In *O'Connor* vs. *State of Texas,* 202 U. S. 501, 50 L. Ed. 1120, this Court held that the defense to an action by a state to recover possession of a tract of land, so far as based upon a Spanish grant, involves no question of a Federal nature which can be considered in the Supreme Court of the United States on writ of error to a state Court, where neither the validity nor construction of any treaty of the United States nor the validity of the grant were challenged.

The petitioners in their Brief rely strongly upon the case of *Nobel* vs. *Oklahoma City,* 297 U. S. 481, 80 L. Ed. 816, in support of their contention not only that this Court ought to review the decision of the New Jersey Court, but also as to the correctness of the New Jersey Court decision. An examination of this case shows that this Court took jurisdiction because it was a case in which the Supreme Court of Oklahoma decided the question of title involved based upon its construction of Acts of Congress and grants by the President of the United States, and although this Court found that the Supreme Court of Oklahoma was in error in its construction and interpretation of the effect of the Acts of Congress and reversed the judgment, it expressly says in the opinion, at page 495 of U. S. Rep.:

> "We express no opinion as to the effect of the habendum clause since this is a question of State Law and appropriately may be decided by the State Court."

POINT II.

The decision of the highest Court of a State involving nothing more than the ownership of property with all the parties in interest represented, cannot be regarded by the unsuccessful party, as a deprivation of any constitutional rights.

In *Heck* vs. *Nicholas, et al.*, 6 Fed. 2nd 10, the Circuit Court of Appeals for the 8th Circuit held at page 11:

> "The sovereignty of a State is supreme over real property situated within its boundaries, and it may establish rules of law and procedure for the transfer and settlement of titles to real property without violating the Federal Constitution, provided the property in question is brought under control of its Court, and a reasonable opportunity to be heard is given to all interested parties by actual or constructive notice, depending upon the circumstances of the case."

In the instant case the record presented by the petitioners clearly shows that the question involved was the title to real property in the State of New Jersey, that all interested parties not only were given an opportunity to be heard, but were actually in Court, represented by Counsel, and submitted their contentions which were passed upon by the Supreme Court of New Jersey whose decision was affirmed by the Court of Errors and Appeals.

In *Tracy* vs. *Ginzberg*, 205 U. S. 170, 51 L. Ed. 755, this Court says on page 178:

> "The Court proceeding entirely upon principles of general and local law and giving all parties in-

> terested in the question an opportunity to be heard, decided that plaintiff had no right to that money. The decision of a State Court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy—upon which question we express no opinion—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a State Court involving merely the ownership of property could be brought here for review—a result not to be thought of."

In *Hooker* vs. *Los Angeles,* 188 U. S. 314, 47 L. Ed. 487, this Court held at page 317 of U. S. Rep.:

> "Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of State Law and of General Public Law, on which the decision of the State Court was final."

In *Doe Ex Dem. Farmer's Heirs* vs. *Eslava, et al.,* 9 Howard 421, an ejectment suit, both parties claiming title to the land in controversy, which was situated in the State of Alabama, this Court on page 444 held:

> "The principles of law applicable to these possessions, as existing in Alabama, and as to land held under ancient French and Spanish permits and

grants, we do not propose to consider; nor to revise the correctness of the rulings of the State Courts concerning them, because they are matters clearly within their sole jurisdiction."

Respondents respectfully submit that the cases above cited and quoted from, are dispositive of the issues pending before this Court upon the present application, and that, therefore, the application for a Writ of Certiorari should be denied.

POINT III.

The record of the case before the Supreme Court and Court of Errors and Appeals of the State of New Jersey shows that the issue involved is a purely local matter, viz., the title to real estate located in the State of New Jersey, the determination of which rests purely on the laws of New Jersey, and no Federal Statute or Treaty or Federal question being involved, this Court does not take jurisdiction either by certiorari or appeal.

It is obvious from a reading of the record that the questions raised by the petitioners in the Courts of New Jersey are of a purely local nature involving no Federal right.

An examination of the Stipulation and Statement of Facts (R. pp. 54 to 62, inclusive) upon which it was agreed that the determination of the Supreme Court of the State of New Jersey on the petitioners' application for a Writ of *Mandamus* should be founded, boldly indicates

(a) That the ancestors of the petitioners conveyed the land in question in 1830 to the Morris Canal and

Banking Company by deed, the habendum clause of which is quoted in full on page 1 of this Brief and therefore not here repeated; and

(b) The petitioners submitted the question of their legal rights under said habendum clause for determination by the Supreme Court of New Jersey in said Stipulation in the following statement appearing on R. 62:

> "1. That the parties do submit to the determination of the Court the following question: Has title to the premises in question reverted to the heirs at law and successors in interest of Charles T. Shipman?
>
> "2. If the Court shall be of the opinion that the premises in question have reverted to the heirs at law and successors in interest of the said Charles T. Shipman, that the Court issue such Writ or make such order in the premises as the facts in the case and the determination of the Court may, in its judgment, warrant."

We turn now to a brief discussion of the opinion of Mr. Justice Porter, of the New Jersey Supreme Court, which clearly demonstrates that this controversy evolved around the interpretation of the language of the deed of 1830 from the petitioners' ancestors concerning property located in New Jersey and the construction and effect thereon, if any, of Statutes of New Jersey (R. pp. 7 to 10, inclusive). The New Jersey Court deemed that:

(a) There has been no change in the use of the land as a public highway.

(b) That there is no reversion.

(c) That the Respondent as successor in title to the Morris Canal and Banking Company acquired a good and valid title from the State of New Jersey.

A reading and consideration of the Stipulation and Statement of Facts and the foregoing opinion of the Supreme Court of New Jersey clearly demonstrates that there is not the slightest inference or suggestion of any claim that even remotely might be a Federal right.

Both the agreed upon facts for the New Jersey Court's determination and the elements upon which its opinion is based deal solely with purely local matters, and the affirmance of the decision of the New Jersey Supreme Court by the Court of Errors and Appeals settles the Law of New Jersey as applied to the facts of the instant case. In this situation the judgment of the New Jersey Court of Errors and Appeals is final, and its decision must be followed by this Court.

Erie Railroad Company vs. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.

In conclusion, the respondent respectfully submits that the application for a Writ of Certiorari should be denied.

Respectfully submitted,

RAYMOND SCHROEDER,
Attorney for Respondent.

PHILIP J. SCHOTLAND,
Of Counsel.

APPENDIX A.

344. (Judicial Code, Section 237, amended.) Appellate jurisdiction of decrees of State Courts; Certiorari.

(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under,

the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

APR 15 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 818.

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

Petitioners,

vs.

CITY OF NEWARK,

Respondent.

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS.

HOLMES, ROGERS & CARPENTER,
By: OLIVER C. CARPENTER,
A member of the firm,
Attorneys for Petitioners,
No. 42 Broadway,
New York, N. Y.

WM. E. CLARK,
CHARLES P. ROGERS,
of New York, N. Y.,

RAYMOND H. COHN,
of Newark, N. J.,

JAMES D. CONNELL,
of Hoboken, N. J. and

VICTOR RUSKIN,
of Jersey City, N. J.,
Of Counsel.

COURT PRESS, 130 Cedar Street, N. Y. C.

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Statement.

This reply brief is made necessary and is deemed advisable by the petitioners for the purpose of bringing to the attention of this Honorable Court a most serious misstatement of a very material fact by respondent in the brief filed in opposition to the granting of the Writ of Certiorari in this cause.

On page 2 of said brief, respondent uses the following language:

> "The petitioners commenced their action in the Supreme Court of New Jersey, the case was duly

> tried, all the parties involved were before the Court and the Supreme Court, in construing the habendum clause in connection with the Laws of the State of New Jersey and the State Statutes involved, deemed that no reversionary rights had arisen in favor of the petitioners. (Opinion of Supreme Court of New Jersey R. 7, reported in 124 N. J. Law 312.)
>
> The only issue was and is a question of title to real estate in New Jersey, which question was duly adjudicated by the Courts of the State of New Jersey. The only theory upon which the petitioners seek this Writ is in effect that because the Supreme Court of New Jersey decided and the Court of Errors and Appeals of New Jersey affirmed said decision, that the petitioners had no property rights, they are thereby deprived of their property without just compensation, evidently because they do not agree with the decision of the Court and still think they are entitled to the property."

There would be no controversy between the parties hereto as to the facts as stated by respondent in the above quoted paragraph were it not for the misstatement:

> "* * * and the Supreme Court, in construing the habendum clause in connection with the Laws of the State of New Jersey and the State Statutes involved, deemed that no reversionary rights had arisen in favor of the petitioners."

Respondent cites, as authority for the above quoted statement, the opinion of the New Jersey Supreme Court (R. 7, reported in 124 N. J. L. 312).

Even the most casual reading of the said opinion readily discloses the fact that the above quoted statement of the respondent is incorrect.

Quite the contrary to the claim of respondent, above quoted, the Supreme Court of New Jersey made no ruling concerning the construction or validity of the deed, which

forms the basis of this matter, and the only reference to the habendum clause of said deed in the said opinion is found in the statement of the facts in the case in the last paragraph on page 8 of the record herein, and such statement of facts forms no part of the opinion of the New Jersey Supreme Court except as a preamble thereto; neither has any question as to the construction or validity of the said deed ever been raised in the Courts below or in the stipulation of agreed facts (R. 54 to 62 inclusive).

In total disregard of the agreed facts in this matter (R. 54 to 62) and of the rights of these petitioners under the contract (in the form of a deed), which forms the basis of this proceeding, the Supreme Court held:

> "Certain lands in Newark were conveyed by relators' ancestors to a canal company for canal purposes, and they claim reversionary title thereto by virtue of its subsequent abandonment as a canal conveyance to the State, and subsequent use by the City for general highway purposes. Held, that there has been no change in the use of the lands as a public highway; and therefore there was no reversion.
>
> On Application for a Writ of Mandamus."

This matter is not before this Court upon a question of title to real estate but for the purpose of testing the constitutionality of a law of the State of New Jersey, created by the Court of last resort in that State because the said State thereby passed and is now enforcing a law by which the respondent is permitted to confiscate and under such law actually has taken and confiscated the property of these petitioners.

Summary of Argument.

POINT I.

The matter here involved is not a local matter but rather one of general law which offends the Constitution of the United States and impairs the rights of these petitioners thus creating a federal question.

Argument.

POINT I.

The matter here involved is not a local matter but rather one of general law which offends the Constitution of the United States and impairs the rights of these petitioners thus creating a federal question.

It would be indeed unecessary and an unjustifiable encroachment upon the time and patience of this Court to burden the Justices thereof with a recitation of the provisions of Title 28, section 344, U. S. C. A. (Judicial Code, section 237, as amended.)

To use the ammunition supplied by the respondent, reference is made to the case of *Caperton* v. *Ballard,* 14 Wall. 238, 241, 20 L. ed. 885, in which this Honorable Court said (as quoted by respondent):

> "This Court has repeatedly declared that it is only under the 25th Section of the Judiciary Act (now 237) that it takes cognizance of error committed in the highest Courts of the State. There must be a Federal question, within the terms of that Section, to enable us to review the decision of a State tribunal. Is there such a question here?"

It is hardly necessary to remind this Honorable Court that the section referred to in the above quotation is now Title 28, section 344 U. S. C. A. (Judicial Code, section 237 as amended) or substantially the same.

The Court in that case asked what here amounts to a pertinent question. Is there such a question here?

As pointed out in the main brief, this matter had its inception in a petition for a writ of mandamus which clearly demonstrates that from the very commencement of the action these petitioners have made claim to a vested right. The right claimed is not a right under a statute of the State of New Jersey but is a right under a contract (in the form of a deed) made by the ancestor of the petitioners to the Morris Canal & Banking Company, which, although it was a creature of the State by reason of its incorporation was not otherwise a part of the State of New Jersey.

The judgment brought here for review is a final judgment of the New Jersey Court of Errors and Appeals, the Court of last resort in the State of New Jersey, and the claim of the petitioners as to why this Court has jurisdiction and why this Court should reverse the said judgment, is that the judgment by its terms has deprived these petitioners of vested rights secured to them by Section 10 of Article 1, and the 5th and 14th amendments of the Constitution of these United States of America, and this question of the deprivation of the rights of the petitioners secured to them by that constitution was raised by the petitioners in their appeal to the New Jersey Court of Errors and Appeals from the New Jersey Supreme Court, which brings the matter clearly within the jurisdiction of this Court.

In the case of *Great Northern Ry. Company* v. *State of Washington*, 300 U. S. 154, this Court said (p. 165):

> "Passing the appellant's contention that a federal right may not be denied under the guise of the application of a state rule of evidence, we come to the question whether, when the asserted right has been denied, this Court is concluded by a finding of fact or a mixed finding of fact and law made by the state court. We have repeatedly held that in such case we must examine the evidence to ascertain whether it supports the decision against the claim of federal right."

The Court in that case considered several cases coming out of a state court involving different situations but all tending to show that when the asserted right has been denied, this Court is not concluded by a finding of fact or a mixed finding of law and fact made by the state court, among which we find the following:

Norris v. *Alabama*, 294 U. S. 587, 53 S. Ct. 579, 79 L. ed. 1074;
Beidler v. *So. Carolina Tax Commission*, 282 U. S. 1, 51 S. Ct. 54, 55, 75 L. ed. 131;
Johnson Oil Company v. *Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. ed. 238.

After referring to the above cases, this Court said at page 167:

> "Citation of authority for the same principle might be multipled indefinitely."

In this matter the petitioners claim before this Court, as it was before the New Jersey Court of Errors and Appeals, is that their constitutional rights have been invaded because the obligations of a contract have been

impaired, their private property has been taken for a public use without just compensation and they have been deprived of their property without due process of law, thus raising the undoubted question of a federal right and entitling these petitioners to the protection of this Court.

In the case of *Phelps* v. *Board of Education of Town of West New York et al.*, 300 U. S. 319 (which was an application for a writ of certiorari to the New Jersey Court of Errors and Appeals), although the judgment of the lower court was there affirmed, this Court, however, said on page 322:

> "This court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right, we give weight to the construction of the statute by the court of the state * * *."

It is respectfully urged that this matter which had its inception in an application for a writ of mandamus wherein it is claimed that the petitioners have been deprived of property without due process of law, as in the instant case, appropriately draws into question constitutionality of the law under which the petitioners' property is taken, and United States Supreme Court has jurisdiction of an appeal from a judgment denying a writ.

In the case of *Chesebro* v. *Los Angeles County Flood Control District et al.*, 306 U. S. 459, 59 S. Ct. Reporter 622, this Court said on page 462:

> "Petitioners appealed to this court; appellees moved, as to the city, to dismiss or affirm on the ground that no federal question was involved; and, as to both

appellants, on the grounds that no substantial federal question was presented, and that the decision below rests upon adequate non-federal grounds. We dismissed the city's appeal for want of a substantial federal question and postponed to the hearing on the merits further consideration of the question of jurisdiction and of the motion to dismiss or affirm.

That motion is denied. The validity of the statute under the federal constitution was by the petition appropriately drawn in question and in substance the decision of the state supreme court is in favor of its validity. See *People of the State of New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67-69, 49 S. Ct. 61, 63, 73 L. ed. 184, 62 A. L. R. 785."

While it is true that in this case no direct attack has been made by the petitioners against any statute of the State of New Jersey, it is also true that the opinion and judgment of the courts below creates a law which has the same working effect as a statute and is understood to be considered by this court as a law of the state. *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817.

The law of the State of New Jersey created by the judgment of its court of last resort has as effectively deprived these petitioners of their rights as could be done by a statute enacted by the legislature of that state. However, there is by the terms of the petition for certiorari herein a collateral attack upon the statutes of the State of New Jersey upon which the courts below allegedly based their opinions, because it is claimed by these petitioners that if the law established by the courts below by precedent is correct, then the statutes upon which the judgment and opinion of the courts below is allegedly based are unconstitutional and deprive these petitioners of a federal right.

CONCLUSION.

It is, therefore, respectfully urged that a writ of certiorari should issue as prayed for in the petition herein.

Respectfully submitted,

HOLMES, ROGERS & CARPENTER,
By OLIVER C. CARPENTER,
A member of the firm,
Attorneys for Petitioners,
No. 42 Broadway,
New York, N. Y.

WM. E. CLARK,
CHARLES P. ROGERS,
of New York, N. Y.,

RAYMOND H. COHN,
of Newark, N. J.,

JAMES D. CONNELL,
of Hoboken, N. J. and

VICTOR RUSKIN,
of Jersey City, N. J.,
Of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 613.

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF, as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BILLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

Petitioners,

vs.

CITY OF NEWARK,

Respondent.

PETITION FOR A REHEARING ON DETERMINATION DENYING A PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS, PURSUANT TO RULE XXXIII OF THE GENERAL RULES OF THE UNITED STATES SUPREME COURT.

HOLMES, ROGERS & CARPENTER,
By: CHARLES P. ROGERS,
A member of the firm,
Attorneys for Petitioners,
No. 42 Broadway,
New York, N. Y.

WM. E. CLARK,
CHARLES P. ROGERS,
of New York, N. Y.,

RAYMOND H. COHN,
of Newark, N. J.,

JAMES D. CONNELL,
of Hoboken, N. J. and

VICTOR RUSKIN,
of Jersey City, N. J.,
Of Counsel.

COURT PRESS, 130 Cedar Street, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 818.

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF, as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

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The Petitioners above named respectfully show:

That on the 12th day of March, 1943, they filed in this Court their petition praying that a writ of certiorari be issued to the New Jersey Court of Errors and Appeals commanding that Court to certify and send to this Court for review and determination a full and complete transcript of the record and of all proceedings in the case which was entitled in that Court Anna S. A. Graf, and others, Relators-Appellants, against the City of Newark, Respondent-Ap-

pellee, and that the judgment of said Court of Errors and Appeals affirming the judgment of the New Jersay Supreme Court and the judgment so affirmed be reversed by this Honorable Court.

There was filed with said petition a brief in support thereof with an appendix reciting the statutes involved. The respondent filed its brief in objecting to the granting of the writ of certiorari (served on petitioners' attorneys on April 6th, 1943).

In said brief counsel for the respondent in their argument made no answer to the merits of the controversy presented by the petitioners and their brief in support thereof, but presented argument only to the effect that *this Court was without jurisdiction to entertain the petition for a writ.*

Counsel for the petitioners prepared and filed a reply brief on the question of jurisdiction, the time to file such reply brief having been extended to the 16th day of April, 1943. The completion of the filing of the reply brief by filing an original thereof upon which there was proof of service upon the attorney for the respondent was effected on the 16th day of April, 1943, which was Friday. The determination of this Court denying the writ was made on the following Monday, April 19th, 1943.

By reason of this short lapse of time petitioners are constrained to believe that this Honorable Court did not have before it, and therefore, could not consider the reply brief filed by petitioners and that the decision and judgment of this Court may have been based solely upon the question raised by the respondent, to wit: lack of jurisdiction. Your petitioners believe that the reply brief, to which reference is made, dispelled any question raised by respondent's brief, that this Court was without jurisdiction to

entertain the petition for a writ of certiorari. In the interest of brevity and conciseness, further reference to the reply brief is omitted, but the Court is requested to give it consideration.

As was said in *Hague, Mayor, et al.* v. *Committee for Industrial Organization,* 307 U. S. 496, 59 Supreme Court Reporter, 954, at page 507 of the official report:

> "Every question arising under the constitution may, if properly raised in a State court, come ultimately to this court for decision."

The Transcript of Record shows that there was raised before the Court of Errors and Appeals of New Jersey the question that the findings, holdings, and decision of the Court below amounted to the taking of the property and the property rights of these petitioners without due process of law, contrary to and in violation of the Fifth and Fourteenth amendments to the Constitution of the United States of America and to the provisions of Paragraph 1, Section 10 of Article 1 of the Constitution of the United States of America (R., p. 6.)

This Court has frequently held that the laws of a state may be created by statute or decisions of the Courts (*Erie Railroad Company* v. *Tompkins,* 304 U. S. 64; 58 S. Ct. 817).

By the opinion in this case (R., pp. 7-10) the Court of Errors and Appeals of the State of New Jersey has created a law of that State whereby the petitioners are deprived of their reversionary titles to the real estate involved which has been taken by the respondent the City of Newark. In reaching that determination the Court passed upon the contract

between the petitioners' ancestor and the Morris Canal and Banking Company dated January 9th, 1830, acknowledged August 4th and August 8th, 1855, and recorded August 9th, 1855 (R., p. 25. Habendum clause, R., p. 26. Opinion, R., pp. 7-10).

As this Court said in *United States Mortgage Co., et. al.* v. *Matthews, et al.*, 293 U. S. 232, 236:

> "It is well-established doctrine that where the contract clause is invoked this Court must determine for itself the nature and effect of the alleged agreement and whether this has been impaired."

To the same effect, *Funkhouser* v. *J. B. Preston Co. Inc.*, 290 U. S. 163, 167. *Coombes* v. *Getz*, 285 U. S. 434, 441; *Violet Trapping Co., Inc.* v. *Grace, et al.*, 297 U. S. 119, 120.

The Court further held that the legislative enactments of the State of New Jersey in 1922 and 1923 were in effect amendments to the charter of the canal company established by Act of the legislature in 1824 and "are in *pari materia* and should be construed together as a whole." Therefore, the New Jersey court in rendering its decision passed upon the statutes of the State of New Jersey. As pointed out in the main brief on the application for a writ, with supporting cases, the legislature may not take away a title vested under a deed many years earlier by such subsequent legislative enactment.

If the decision of this Court in denying the petition for a writ of certiorari was based upon lack of jurisdiction, then your petitioners urge that a rehearing be granted, and that upon such rehearing the writ be granted.

If the decision and determination of this Court was not based upon lack of jurisdiction, then your petitioners urge that it is disclosed by the record that they have been deprived of their vested property rights without due process of law and without just compensation.

If the decision and determination denying the petition for a writ was based upon the determination that the language used in the deed conveying the premises in question: "for so long as the same shall be used for the purposes for which the canal company have power to use the same by the true intent and meaning of the Act", under the circumstances as shown in the record, does not upon abandonment of the canal constitute a true reversion, then your petitioners respectfully pray that a rehearing be granted, and if the writ be denied on such rehearing, that the ground upon which it is denied be stated by this Honorable Court in its opinion or determination.

As the matter now stands, your petitioners represent that their constitutional rights have been invaded in that the conract existing between your petitioners' ancestor and the Morris Canal and Banking Company has been impaired; that the private property of your petitioners has been taken for a public use without just compensation; and that your petitioners have been deprived of their property without due process of law; and that they are entitled to have these questions passed upon by this Honorable Court.

WHEREFORE, your petitioners respectfully pray that this Court grant a rehearing upon their petition for a writ of certiorari to the New Jersey Court of Errors and Appeals and that upon such rehearing this Court grant their petition as in said petition prayed, and

that these petitioners may have such other and further relief in the premises as may be just.

Respectfully submitted,

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF as Executor of the Estate of George C. Shipman, deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,
Petitioners.

By: CHARLES P. ROGERS,
A member of the firm of Holmes, Rogers & Carpenter,
Attorneys for Petitioners,
No. 42 Broadway,
New York, N. Y.

WM. E. CLARK,
CHARLES P. ROGERS,
of New York, N. Y.,

RAYMOND H. COHN,
of Newark, N. J.,

JAMES D. CONNELL,
of Hoboken, N. J. and

VICTOR RUSKIN,
of Jersey City, N. J.,
Of Counsel.

Certificate of Counsel.

I, CHARLES P. ROGERS, of Counsel to the petitioners herein do hereby certify that the foregoing petition for a rehearing upon the denial of the application for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey is presented in good faith and not for delay.

CHARLES P. ROGERS,
Counsel.